90-1909

Supreme Court, U.S.
FILED
JUN 21 1991
OFFICE OF THE CLERK

NO. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1990

REGINA THOMAS WALTON,
Petitioner,

v.

COWIN EQUIPMENT COMPANY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ROBERT L. WIGGINS, JR.
(Counsel of Record)
1400 SouthTrust Tower
Birmingham, Alabama 35203
(205) 328-0640

Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

1. Does the Seventh Amendment preserve a right to trial by jury in Title VII actions because they are essentially tort claims involving back-pay as a remedy which would have been triable to a jury in 18th Century England.

LIST OF PARTIES

The parties to this case in the Court of Appeals were as follows:

Regina Thomas Walton

Cowin Equipment Company, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AMENDMENT AND STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

ARGUMENT:

THE SEVENTH AMENDMENT GUARANTEES A JURY TRIAL IN TITLE VII ACTIONS SEEKING MONETARY RELIEF 7

1. First Prong 7

2. Second Prong 11

3. The Congressional Characterization Does Not Control 21

CONCLUSION 24

CERTIFICATE OF SERVICE 25

APPENDICES A-1

TABLE OF AUTHORITIES

Cases: *Page(s)*

Albermarle Paper Co. v. Moody, 422 U.S. 405, 417, 418-19, 95 S.Ct. 2362, 2371-72, 45 L.Ed.2d 280 (1975) 14, 21

Bailey v. USX Corp., 850 F.2d 1506, 1509 (11th Cir. 1988) 19

Bancroft v. Taylor, 91 F.2d 579 (5th Cir. 1937) 21

Barber v. Kimbrell's, Inc., 577 F.2d 216, 225 n.6 (4th Cir. 1981), *cert. denied*, 439 U.S. 934, 99 S.Ct. 329, 58 L.Ed.2d 330 (1978) 21

Beacon Theatres, Inc. v. Westener, 359 U.S. 500, 501, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959) 5, 18

Beesley v. Hartford Fire Ins. Co., 717 F. Supp. 781 (N.D. Ala. 1989), *reconsidered*, 723 F. Supp. 635, 643, 645-646, 647, 650 (N.D. Ala. 1989) ..... *passim*

Birmingham Electric Co. v. Cochran, 8 So.2d 171, 174 (Ala. 1942) 12

Burke v. United States, ___ F.2d ___, (6th Cir. 1991) 15

Carey v. Piphus, 435 U.S. 247, 253 (1978) 10

Carnival Cruise Lines, Inc. v. Snoody, 457 So.2d 379 (1984) 12

Cary v. Greyhound Bus Co., Inc., 500 F.2d 1372 (5th Cir. 1974) 19

Chibler v. Parhtman, 424 U.S. 409, 417 (1976) 10

TABLE OF AUTHORITIES — (Continued)

Cases: *Page(s)*

Citronelle - Mobile Gathering, Inc. v. O'Leary, 499 F. Supp. 871 (S.D. Ala. 1980) 15

Culpepper v. Reynolds Metal Co., 296 F. Supp. 1232, 1239 n.5 (N.D. Ca. 1968), *rev'd on other grounds,* 421 F.2d 888 (5th Cir. 1970) 21

Curtis v. Loether, 415 U.S. 189, 195 n.10, 196 n.14, 94 S.Ct. 1005, 1009 n.10, 1010, 39 L.Ed.2d 260 (1974) ..... *passim*

Dairy Queen, Inc. v. Wood, 369 U.S. 469, 471-473 & n.8, 82 S.Ct. 894, 896-897 & n.8, 8 L.Ed.2d 44 (1962) 6, 11, 17, 18, 22

Dimick v. Scheidt, 293 U.S. 474, 486 (1935) 5

Emmens v. Eldlerton, 10 Eng. Rep. 606, 615 (1835) 11

Fitzpatrick v. Dean, 177 So.2d 909, 911-912 (Ala. 1965) 12

Gnossos Music v. Mitken, Inc., 653 F.2d 117, 119 (4th Cir. 1981) 21

Goodman v. Lukens Steel Co., 482 U.S. 656, 107 S.Ct. 2617, 2621 (1987) 9

Granfinanciera, S.A. v. Norberg, 492 U.S. 33, 109 S.Ct. 2782, 2790, 2792, 2794, 2795, 106 L.Ed.2d 26 (1989) ..... *passim*

Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982) 8

Jenouri v. WAPA-TV, 747 F. Supp. 118 (D.P.R. 1990) 11

Johnson v. Wolff's Clothier, Inc., 663 F.2d 800, 804 (8th Cir. 1981) 15

Lehman v. Nakshian, 453 U.S. 156, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981) 14

TABLE OF AUTHORITIES — (Continued)

Cases: *Page(s)*

Lengen v. Department of Transp.,
903 F.2d 1464, 1468 (11th Cir. 1990) 17

Local No. 391 v. Terry, 110 S.Ct. 1339, 1345,
1347, 1348 (1990) ..... *passim*

Lorrilard v. Pons, 434 U.S. 575, 580,
98 S.Ct. 866, 870, 55 L.Ed.2d 40 (1978) 14

Lytle v. Household Mfg. Co., 110 S.Ct.
1331, 1335 n.1 (1990) 4

Memphis Comm. Sch. District v. Stachura,
477 U.S. 299, 305-306 (1986) 10

Meritor Savings Bank FSB v. Vinson,
477 U.S. 57, 65-66, 72, 106 S.Ct. 2399,
2405-06, 2408, 91 L.Ed.2d 49 (1986) 8, 10

Mills v. Intern. Broth. of Teamsters, Etc.,
634 F.2d 282 (5th Cir. 1981) 19

Ochoa v. American Oil Co., 338 F. Supp. 914,
915 n.2, 917-918, 919 (S.D. Tex. 1972) 10, 11, 12,
13, 16, 21

Opelika Production Credit Association, Inc. v. Lamb,
361 So.2d 95, 92-99 (Ala. 1978) 18

Owens v. Okure, 488 U.S. 235,
109 S.Ct. 573, 577 (1989) 9

Palstorff v. Fletcher, 430 F. Supp. 592 (N.D. Ala. 1977) 19

Patterson v. McLean Credit Union, 491 U.S. 164,
109 S.Ct. 2363, 2374, 2377 (1989) 2, 8, 9

Pons v. Lorillard, 549 F.2d 950, 952
(4th Cir. 1977), *aff'd*, 434 U.S. 575,
98 S.Ct. 866, 55 L.Ed.2d 40 (1978) 21

TABLE OF AUTHORITIES — (Continued)

Cases: *Page(s)*

Porter v. Warner Holding Co., 328 U.S. 395, 402, 66 S.Ct. 1086, 1091, 90 L.Ed. 1332 (1946) 16

Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 1792 (1989) 10, 17

Reiner v. State of New Jersey, 732 F. Supp. 530, 534 (D.N.J. 1990) 9, 14, 18

Rogers v. Loether, 467 F.2d 1110, 1122-23 (7th Cir. 1972), *affirmed sub nom. Curtis v. Loether*, 415 U.S. 189 (1974) 21

Ross v. Barnhard, 396 U.S. 531, 538, 90 S.Ct. 733, 738, 24 L.Ed.2d 729 (1970) 7, 22, 23

Sabala v. Western Gillette, Inc., 516 F.2d 1251 (5th Cir. 1975) 19

Santiago Negron v. Catro Divila, 865 F.2d 431, 441 (1st Cir. 1989) 12

Schoenthal v. Irving Trust Co., 287 U.S. 92, 94, 53 S.Ct. 50, 51, 77 L.Ed. 185 (1932) 17

Scott v. Neely, 140 U.S. 106 (1891) 17, 23

Sears v. Atchison, T & S.F. Ry. Co., 645 F.2d 1365 (5th Cir. 1981) 19

Setser v. Novack Inv. Co., 638 F.2d 1137, 1140-41, 1142 n.9 (6th Cir.), *cert. denied*, 454 U.S. 1064 (1981) 9, 15, 19

Sibley v. Fulton-DeKalb Collection Services, 677 F.2d 830, 832-833 (11th Cir. 1982) 9, 21, 22

St. Regis Paper Co. v. Kerlin, 476 So.2d 64 (Ala. 1985) 15

Sullivan v. School Board of Pinellas County, 773 F.2d 1182 (11th Cir. 1985) 10

TABLE OF AUTHORITIES — (Continued)

Cases: *Page(s)*

Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.,
294 F.2d 486, 491 (5th Cir. 1961) 11

Tull v. United States, 481 U.S. 412, 417-418,
107 S.Ct. 1831, 1838-1839,
95 L.Ed.2d 365 (1987) 7, 11, 16, 18, 21

United States Postal Service Bd. of Governors
v. Aikens, 460 U.S. 711, 715-717,
103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983) 7, 10

Walton v. Cowin Equipment Co.,
773 F. Supp. 327 (N.D. Ala. 1990),
reversed, 930 F.2d 924 (11th Cir. 1991) ..... *passim*

Whitehead v. Shattuck, 138 U.S. 146 (1991) 23

Wicker v. Hoppock, 6 Wall. 94, 99,
18 L.Ed. 752 (1867) 14

Wilson v. Garcia, 471 U.S. 261, 276-277,
105 S.Ct. 1947-1948 (1985) 9

Wirtz v. Jones, 340 F.2d 901, 904 (5th Cir. 1965) 21

Yellow Freight System, Inc. v. Donnelly,
___ U.S. ___, 110 S.Ct. 1566 (1990) 22

Statutes:

Civil Rights Act of 1964,
42 U.S.C. 2000e *et seq.* ..... *passim*

Civil Rights of 1866,
42 U.S.C. Section 1981 ..... *passim*

28 U.S.C. § 1254 (1) 1

TABLE OF AUTHORITIES — (Continued)

Statutes: *Page(s)*

Equal Protection Clause of the Fourteenth Amendment to the United States Constitution 10

Federal Rule of Civil Procedure 38 (a) 1, 23

Federal Rule of Civil Procedure 52 (a) 3

Seventh Amendment to the United States Constitution ..... *passim*

Other Authorities:

3 Blackstone, *Commentaries on the Law of England* 161 10

25 C.J.S. Damages, § 38, pp. 719, 721 12

Comment, *Developments — Section 1981,* 15 Har. Civ. Rights - Civ. Lib. L. Rev. 250 15

Gamble, *Alabama Law of Damages,* § 34-1, p. 385 (1982) 15, 18, 19

Restatement of Restitution, pp. 5-6 (1937) 15, 20

The Seventh Amendment and Civil Rights Statutes: *History Adrift In A Maelstrom,* 68 Northwestern U.L.R. 503, 526 n.121 (1973) 20

OPINIONS BELOW

The decisions at issue below are reported as *Walton v. Cowin Equipment Co.*, 733 F. Supp. 327 (N.D. Ala. 1990), *reversed*, 930 F.2d 924 (11th Cir. 1991) (Table). As additional grounds for granting a jury trial in the current case, the district court adopted its opinion in *Beesley v. The Hartford Fire Insurance Co.*, 717 F. Supp. 781 (N.D. Ala. 1989), *reconsidered*, 723 F. Supp. 635 (N.D. Ala. 1989).

JURISDICTION

The judgment sought to be reviewed was dated and entered on March 11, 1991, by the Court of Appeals for the Eleventh Circuit. This Petition is being filed within the time extended by this Court after entry of the Eleventh Circuit's judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AMENDMENT AND STATUTES INVOLVED

The issue in this Petition involves the Seventh Amendment to the United States Constitution which states the following:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Federal Rule of Civil Procedure 38 (a) states:

> (a) **Rights Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

The substantive statute involved in this case is § 706 (g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (g). The statute reads, *inter alia*, as follows:

§ 706 (g) If this court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, *but is not limited to,* reinstatement or hiring of employees with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings of amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. (emphasis supplied).

STATEMENT OF THE CASE

The plaintiff timely filed a Complaint challenging racial discrimination in her employment under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964. The Complaint requested both legal and equitable relief, including "back-pay, reimbursement for lost-benefits, prejudgment interest, front-pay, and any other consequential damages in amounts to be proved at trial; and . . . compensatory damages . . . and . . . punitive damages in an amount reasonable and commensurate with the harm done, and calculated to be sufficient to deter such conduct in the future; and . . . such additional relief as the Court deems proper and just". Complaint, pp. 6-7.

The district court dismissed plaintiff's claims under 42 U.S.C. § 1981 on the basis of the decision in *Patterson v. McLean Credit Union,* 109 S.Ct. 2363 (1989). That dismissal is not an issue in this Petition. Thereafter, the plaintiff continued to seek both legal and equitable relief. Pretrial Order,

¶ 6 (b). As a part of the Pretrial Order, the Court gave the parties ten days to request a jury trial on the remaining Title VII claim and the plaintiff moved for such a trial within the allotted time.

The district court granted the request for a jury trial after reviewing the defendant's opposition, holding that a jury trial was required under the Seventh Amendment to the United States Constitution. App. A-1.

After trial, the jury returned a verdict on special interrogatories finding that the defendant "intentionally" discriminated against the plaintiff because of her race and awarded $14,622.40 as the "amount of monetary loss . . . which plaintiff has proven she sustained as a proximate consequence of the defendant's discriminatory treatment of plaintiff". App. A-33. After the jury verdict, the defendant again contested the right to a jury trial of the Title VII claim, but that motion was denied on the basis of an extensive analysis of the Seventh Amendment by the district court. App. A-2 to A-26.

The Eleventh Circuit reversed the jury verdict, in an unpublished three paragraph opinion, holding that Title VII actions "are proceedings in equity" and "that, Title VII litigants are not entitled to a trial by jury".[1] App. A-30. The Court of Appeals gave no basis for its ruling except to cite two of its own cases which did not address the Seventh Amendment or the right to a jury trial in Title VII cases. App. A-30. The jury verdict was vacated and remanded with instructions to "treat this case as a proceeding in equity, consider whether to grant the relief appellant seeks, and enter findings of fact and conclusions of law as required by Fed. R. Civ. P. 52 (a)". App. A-30.

---

[1]On appeal, the parties briefed and argued the issue of whether the Seventh Amendment entitled the plaintiff to a jury trial. Other appellate issues were also raised below. The Court of Appeals reversed the judgment below without reaching any issue except entitlement to a jury trial. App. A-30.

REASONS FOR GRANTING THE WRIT

This Court has stressed on a number of occasions, including twice last year, that it has not yet decided whether a jury trial is allowed in Title VII actions seeking monetary relief.[2] The Petitioner's jury verdict has been taken from her by the Eleventh Circuit on the ground that she was not entitled to a jury trial. If she had a right to a jury trial as the district court held, then the denial of certiorari will violate the Seventh Amendment by depriving her of the jury verdict which the Constitution requires to be "preserved".

The Constitutional violation is not limited to this one Petitioner. The lower courts for the last twenty-five years have consistently denied jury trials in thousands of Title VII actions. The lower courts have merely followed several of the earliest Title VII decisions which *assumed* either that the ambiguous *statutory* characterization of back-pay as an equitable remedy controlled the *Constitutional* right to a jury trial or that it was merely incidental to injunctive relief. Those assumptions have now been clearly rejected by this Court in *Granfinanciera S.A. v. Nordberg,* 109 S.Ct. 2792, 2795 (1989), where it was held that Congress cannot negate the Seventh Amendment right to a jury trial by characterizing traditional legal remedies as equitable in nature.

Unless the current Petition is granted, the lower courts will continue to deny jury trials and upset jury verdicts without the careful attention demanded by the Amendment and this Court's decisions. The Eleventh Circuit continued that practice in this case by reversing the careful analysis of the district court without any real analysis of its own.[3] This Court has

---

[2] *Lytle v. Household Mfg. Inc.,* 110 S.Ct. 1331, 1335 n.1 (1990) ("This Court has not ruled on the question whether a plaintiff seeking relief under Title VII has a right to a jury trial".); *Local #391 v. Terry,* 110 S.Ct. 1339, 1348 (1990).

[3] The district court below took this Court's decisions seriously and applied the historical analysis commanded, but the Eleventh Circuit reversed in an Opinion which continued to look no further than the ambiguous Congres-

recently held again that " '[m]aintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care' ".[4]

The mandatory analytical standards which the Eleventh Circuit did not apply require a comparison of the type of action and the remedy sought with the historical distinction between practice at law and in equity so that the right to a jury trial is "preserved".

Careful analysis demonstrates that Title VII is most like an intentional tort which was triable at law by a jury in 18th Century England. This Court in a number of decisions has characterized race discrimination claims as intentional torts.[5]

The remedy of back-pay is also legal in nature, amounting to a compensatory damage which was awardable by a jury in 18th Century England. Back-pay was available as a remedy in various types of common law actions in 18th Century England (and has been since then), including personal injury actions and suits for assumpsit between master and servant. This Court recently held back-pay to be a legal remedy requiring a

---

sional characterization in § 706 (g) of Title VII. *Compare* App. A-2-26 *with* App. A-29-30. That statute merely says that a court may award such relief "as may be appropriate, which may include, *but is not limited to* . . . other equitable relief as the court deems appropriate". 42 U.S.C. § 2000e-5 (g) (emphasis supplied). This ambiguous reference does not override the Seventh Amendment or supplant the historical analysis demanded by this Court and the Constitution.

[4]*Local No. 391 v. Terry*, 110 S.Ct. 1339, 1344-45 (1990) [Quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959), and *Dimick v. Scheidt*, 293 U.S. 474, 486 (1935)]. See also, *Granfinanciera, supra*, 109 S.Ct. at 2794.

[5]Title VII actions are also closely analogous to an action for *assumpsit on a quantum meruit* between a master at law and servant in 18th Century England. In such an action a servant could sue his master for wrongfully terminating his employment, and the measure of his damages was back-pay reduced by interim earnings. That is identical to the measure of damages in a Title VII action. Such an action was tried exclusively in the law courts, and not equity, in 18th Century England.

jury trial in an analogous area of labor law. *Local #391 v. Terry, infra.* Back-pay in Title VII actions is not an equitable restitution or disgorgement of profits.[6] Congress structured tort principles of mitigation and causation in § 706 (g) of Title VII so that back-pay would *compensate* the plaintiff only for his *actual losses* which were *caused* by the unlawful discrimination. These principles are foreign to *equitable* principles of restitution and disgorgement of profits in 18th Century England. Restitutionary awards were made by both law courts and equity courts, but a monetary award which compensated the tort victim for his injury was awarded only at law by a jury, not by equity.[7] Restitutionary damages were the chief remedy of the *common law* for centuries, and equity only provided such damages when they were not available at the common law. That is the essential principle of equity.

Back-pay also cannot be made into equitable relief by intertwining it with injunctive relief or characterizing it as incidental to such relief. This Court has consistently rejected this argument during the last thirty years. (*Curtis, infra* and *Dairy Queen, infra.*) There was no injunctive relief in the current case. The back-pay sought was independent from any injunctive relief sought.

The Petition should be granted unless the persistent denial of a jury trial without any real consideration of "preserving" the Seventh Amendment right is intended to continue in Title

---

[6]There are many Title VII situations in which there is nothing belonging to the plaintiff which can be restored from the defendant, including cases involving hiring, harassment, assault, abusive working conditions, etc. In all these actions, monetary remedies under Title VII are strictly compensatory for the injury done and are not restitutionary in any sense of the word. Even in promotion and discharge cases, back-pay is not restitutionary, but compensatory, because the plaintiff is not being repaid anything which he ever had or for actual labor done, but instead is being compensated for work he *would have done* in the absence of the intentional tort of race discrimination. This type of compensatory remedy was always available at the common law, not in equity.

[7]Restatement of Restitution, pp. 5-7, 17-18, 21.

VII cases in the lower courts. The Court should not continue to merely reserve the issue as it has done on four occasions in the last twenty years. The issue should be decided so that the jury verdict in this case, and the plaintiff's Seventh Amendment right to that verdict, is not lost. If the plaintiff is entitled to a jury trial, the Seventh Amendment commands that this Court preserve the right.

ARGUMENT

THE SEVENTH AMENDMENT GUARANTEES A JURY TRIAL IN TITLE VII ACTIONS SEEKING MONETARY RELIEF

Twice in 1990 this Court reiterated that it had not yet decided whether there is a Constitutional right to a jury trial in Title VII actions. The Seventh Amendment right to a jury trial is controlled by a two-step historical test that was ignored by the Eleventh Circuit below. The two-step analysis requires: "[f]irst we compare the statutory action to the 18th Century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature".[8]

1. First Prong: Title VII prohibits intentional harm to another person because of his or her race or sex.[9] As such, it is most like an intentional tort which was t iable at law to a jury

---

[8]*Local No. 391 v. Terry*, 110 S.Ct. 1339, 1345 (1990 [quoting from *Tull v. United States*, 481 U.S. 412, 417-418, 107 S.Ct. 1831, 1835-1836, 95 L.Ed.2d 365 (1987)]. See also, *Granfinanciera S.A. v. Nordberg*, 109 S.Ct. 2782, 2790, 106 L.Ed.2d 26 (1989).

[9]In finding the closest analogy to 18th century actions in England, the " 'question depends on the nature of the issue to be tried rather than the character of the overall action' ". *Ross v. Barnhard*, 396 U.S. 531, 538, 90 S.Ct. 733, 738 (1970); *Local No. 391 v. Terry, supra*, 110 S.Ct. at 1347 (emphasis in *Terry*). The "issue to be tried" in the typical Title VII action is one of intentional harm to another person because of his or her race or sex. *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715-717, 103 S.Ct. 1478, 1482,

in 18th Century England. The intentional harm of another person prohibited by Title VII can include racial or sexual harassment, including assault and racial epithets which might otherwise sound in tort.[10] In applying the Seventh Amendment to racial discrimination claim brought under other parts of the civil rights acts, the Court has held that "this cause of action is analogous to a number of tort actions recognized at common law". *Curtis v. Loether,* 415 U.S. 189, 195 & n.10, 94 S.Ct. 1005, 1009 & n.10, 39 L.Ed.2d 260 (1974). More specifically, the Court stated that "[a]n action to redress racial discrimination may be likened to an action for defamation or intentional infliction of mental distress" and that " 'racial discrimination might be treated as a dignitary tort' ". *Curtis v. Loether, supra* at n.10.[11]

---

75 L.Ed.2d 403 (1983) ("The 'factual inquiry, in a Title VII case' is whether the defendant intentionally discriminated against the plaintiff. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of facts. **** The law often obliges finders of fact to inquire into a person's state of mind. As Lord Justice Bowen said in treating this problem in an action for misrepresentation nearly a century ago: 'The state of a man's mind is as much a fact as the state of his digestion' ".).

[10] *Patterson v. McLean Credit Union,* 109 S.Ct. 2363, 2374 (1989) ("Racial harassment in the course of employment is actionable under Title VII's prohibition against discrimination in the terms, conditions or privileges of employment"); *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 65-66, 106 S.Ct. 2399, 2405-06, 91 L.Ed.2d 49 (1986) (" 'One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers' *** [A] plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment".); *Henson v. Dundee,* 682 F.2d 897, 902 (11th Cir. 1982); *Beesley v. Hartford Fire Ins. Co.,* 723 F. Supp. 635, 646 (N.D. Ala. 1989).

[11] Although *Curtis* examined Title VIII of the Act, which includes damages as a potential remedy, that does not affect its relevance to the first prong of the Seventh Amendment analysis. That prong looks at "the issue to be decided" rather than the relief to be award. The issue to be decided in a race discrimination case under Title VIII is identical to the issue to be decided under Title VII, i.e., intentional infliction of harm to another person because of his or her race. See, *Beesley v. Hartford Fire Ins. Co., supra,* 723 F.

This Court has further held that Title VII and § 1981 involve identical issues to be tried, and that Section 1981 is most closely analogous to common law personal injury actions.[12] The lower courts have allowed jury trials of back-pay claims in §1981 actions although there is a split in the Circuits. *Compare Setser v. Novack Inv. Co.*, 638 F.2d 1137, 1140-41 (6th Cir.), *cert.*

Supp. at 643 ("The clear object of Title VIII is to ***make the victim whole***. The clear object of Title VII is also to ***make the victim whole***. It is impossible to fashion a believable rationale for granting a jury trial in Title VIII while denying it is Title VII".). See also, *Reiner v. State of New Jersey*, 732 F. Supp. 530 (D. N.J. 1990) (State employment discrimination statute found to be "analogous to a defamation, libel or other common law "dignitary tort" and jury trial required by Seventh Amendment.).

[12] *Compare Patterson v. McLean Credit Union*, 109 S.Ct. 2363, 2377 (1989) (holds that § 1981 and Title VII are "analogous areas of civil rights law" and that issues to be tried and "scheme of proof" in Title VII "should apply to claims of racial discrimination under § 1981") *with Goodman v. Lukens Steel Co.*, 107 S.Ct. 2617, 2621 (1987) (Holds race, discrimination claims under § 1981 are "in essence claims for personal injury" because they are "part of a federal law barring racial discrimination, which . . . is a fundamental injury to the individual rights of a person"; and the fact that Section 1981 "has far-reaching economic consequences does not change this conclusion since such impact flows from guaranteeing the personal right to engage in economically significant activity free from racially discriminatory interference".). See also, *Owens v. Okure*, 109 S.Ct. 573, 577 (1989) ("'Section 1983 claims are best characterized as personal injury actions'"); *Wilson v. Garcia*, 471 U.S. 261, 276-277, 105 S.Ct. at 1947-48 (1985) ("Among the potential analogies, Congress unquestionably would have considered the remedies established in the Civil Rights Act to be more analogous to tort claims for personal injury than, for example, to claims for damages to property or breach of contract. *** Had the 42nd Congress expressly focused on the issue described today, we believe it would have characterized Section 1983 as conferring a generally remedy for injuries to personal rights".). See also, *Sibley v. Fulton-DeKalb Collection Services*, 677 F.2d 830, 833-834 (11th Cir. 1982) (In holding that a jury trial was required by the Seventh Amendment, Court held that "the thrust of the Fair Debt Collection Practices Act is prevention of harassment and abuse as well as false, deceptive or misleading practices. It clearly falls into a traditional tort area analogous to a number of traditional torts".). See also, *Tillman v. Wheaton - Haven Recreation Ass'n*, 517 F.2d 1141, 1143 (4th Cir. 1975) ("an action brought under statutes forbidding racial discrimination is fundamentally for the redress of a tort".).

denied, 454 U.S. 1064 (1981), *with Sullivan v. School Board of Pinellas County*, 773 F.2d 1182, 1187 (11th Cir. 1985). Actions under § 1983, which can include claims of race discrimination under the Equal Protection Clause of the Fourteenth Amendment, involve "a species of tort liability in favor of persons who are deprived of 'rights, privileges or opportunities secured' to them by the Constitution".[13]

The Court has also held that Congress intended "common law principles" of agency to apply to Title VII claims, and it has applied principles of causation and intent which are identical to that of common law torts.[14]

For these reasons, the "issue to be decided" in a Title VII case is most like a personal injury action which in 18th Century England was triable at law to a jury. Eighteenth Century equity practice had no analogue to Title VII actions.

Title VII is also more similar to an action at law for *assumpsit on a quantum meruit* than to any equitable claim of 18th Century England. Blackstone states that a servant could sue his master for wages wrongfully withheld "by bringing his action in the case upon this implied *assumpsit* wherein he is at liberty to suggest that I promised to pay him so much as he reasonably deserved, and then to aver that his trouble was really worth such a particular sum, which the defendant has omitted to pay". 3 *Blackstone Commentaries on the Law of England* 161.

---

[13] *Memphis Comm. Sch. District v. Stachura*, 477 U.S. 299, 305-306 (1986) [quoting *Carey v. Piphus*, 435 U.S. 247, 253 (1978), and *Chibler v. Parhtman*, 424 U.S. 409, 417 (1976)].

[14] *Meritor Savings Bank FSB v. Vinson, supra*, 477 U.S. at 72, 106 S.Ct. at 2408 ("... Congress wanted courts to look to agency principles for guidance in this area [although] such common law principles may not be transferable in all their particulars to Title VII...."); *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775, 1792 (1989) (Constructs causation principles identical to common law causation principles); *U.S. Postal Service v. Aikens, supra*, 460 U.S. at 716-717, 103 S.Ct. at 1482 (Analogizes intent in Title VII to intent in tort of misrepresentation); *Ochoa v. American Oil Co.*, 338 F.2d 914, 919 (S.D. Tex. 1972) ("It is of decisive significance to the present inquiry to note that Title VII literally codifies the common law measure of damages for wrongful discharge".).

This cause of action, according to Blackstone, would be one at law to be "submitted to the determination of a jury who will assess such a sum in damages as they think he really merited". *Id.* Accord, *Ochoa v. American Oil Co.*, 338 F. Supp. 914, 917-918 (S.D. Tex. 1972) (Court examined the 18th Century English analogue to Title VII and found three historical actions at law available to a servant seeking wages from his master; and concluded that Seventh Amendment guaranteed jury trial in Title VII action. *Beesley v. Hartford Ins. Co.*, 723 F. Supp. at 647. See also, *Jenouri v. WAPA-TV*, 747 F. Supp. 118, (D.P.R. 1990) (Jury trial required by Seventh Amendment in Title VII actions).

2. Second Prong: The back-pay structured by Title VII is compensatory in nature, not restitutionary, and would have been awarded at law by a jury in 18th Century England.[15] It does not matter that injunctive or other equitable remedies are also available along with the back-pay.[16]

Back-pay in suits between master and servant was considered to be a compensatory damage awardable by juries in 18th Century England. See, e.g., *Emmens v. Alderton*, 10 Eng. Rep. 606, 615 (1853). The method of calculating such back-pay was exactly the same in the English law courts as in the text of Title

---

[15]The determination of whether back-pay is legal or equitable is used as an analytical aid by the Court in determining whether the action before it is a "suit at common law" in which "the right of trial by jury shall be preserved". In other words, in this prong of the analysis we are once again trying to determine whether the 18th Century English courts would have characterized back-pay as legal or equitable so that it can be known whether the right to a jury trial was "preserved" by the Seventh Amendment.

[16]*Curtis v. Loether*, 415 U.S. at 196 n.11, 94 S.Ct. at 1009 n.11 ("The right cannot be abridged by characterizing the legal claim as 'incidental' to the equitable relief sought"); *Dairy Queen, Inc. v. Wood, supra*, 369 U.S. at 471-473 & n.8, 82 S.Ct. at 896-897 & n.8 ("'It would make no difference if the equitable cause clearly outweighs the legal cause so that the basic issue of the case taken as a whole is equitable. As long as any legal cause is involved the jury rights it creates control'"), [quoting from *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486, 491 (5th Cir. 1961]. See also, *Tull v. United States, supra*, 107 S.Ct. at 1839.

VII which requires causation between the wrong and the injury, and mitigation through interim earnings. *Ochoa v. American Oil Co.*, 338 F. Supp. 914, 918-919 (S.D. Tex. 1972); *Beesley v. Hartford Fire Ins. Co., supra*, 723 F. Supp. at 645-46.

Similarly, there is a parallel between compensatory damages in personal injury actions and back-pay under Title VII. It has long been held that "loss of earnings, wages or salary is an element of damages" in common law actions for personal or contractual injury. 25 C.J.S. Damages, § 38, pp. 719, 721 (citing voluminous cases).[17] See also, *Santiago-Negron v. Castro-Divila*, 865 F.2d 431, 441 (1st Cir. 1989) ("In tort actions for personal injury tried to a jury, lost wages are invariably treated as being part of compensatory damages. *** Our analysis leads us to conclude that the determination of back-pay as a factor of compensatory damages involves the substance of a common-law right to a trial by jury.").

The statutory inclusion of mitigation principles in Title VII demonstrates its compensatory character. 42 U.S.C. § 2000e-5 (g).[18] Such mitigation principles are taken directly from the practice of the common law in personal injury actions and

---

[17]The Alabama courts are typical of all common law courts in holding that "[i]n a personal injury action, a plaintiff is entitled to recover both the value of the work time lost prior to trial ('lost earnings') and the value of the reduction in his ability to earn a living ('impairment of earning capacity')". *Carnival Cruise Lines, Inc. v. Sroddy*, 457 So.2d 379, (1984). Accord, *Birmingham Electric Co. v. Cochran*, 8 So.2d 171, 174 (Ala. 1942); *Fitzpatrick v. Dean*, 177 So.2d 909, 911-912 (Ala. 1965). See also, *Santiago-Negron v. Castro-Davila*, 865 F.2d 431, 441 (1st Cir. 1989) (Back-pay for unlawful discharge under Section 1983 is a legal remedy because "[i]n tort actions for personal injury tried to a jury, lost wages are normally treated as being part of compensatory damages" and "the determination of back-pay as a factor of compensatory damages involves the substance of a common law right to a trial by jury".).

[18]Common law principles of mitigation of damages are found in § 2000e-5 (g) in the sentence reading "interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back-pay otherwise allowable". See, *Ochoa v. American Oil Co.*, 338 F. Supp. 914, 918 (S.D. Tex. 1972).

actions for breach of employment contract between a master and servant.[19]

Compensatory monetary remedies are "the traditional form of relief offered in the courts of law". *Local No. 391 v. Terry*, 110 S.Ct. 1339, 1347 (1990). There, this Court characterized a claim for "back-pay and benefits" by an employee as "compensatory damages" protected by the Seventh Amendment, but then noted that it has "not held that any award of monetary relief must *necessarily* be 'legal' relief" and that in certain circumstances it would "find an exception to the general rule and characterize damages as equitable". *Id.*, 110 S.Ct. 1347-48. The principal exception to the general rule that damages are legal remedies is where the damage can be characterized as restitutionary, "such as in actions for disgorgement of improper profits". *Id.* The Court, however, has never held that back-pay is "restitutionary", rather than compensatory, or that this would defeat the Seventh Amendment even if it were.[20]

---

[19]In *Ochoa v. American Oil Co.*, 338 F. Supp. 914, 918-919 (S.D. Tex. 1972), the Court held that this was persuasive proof that back-pay in Title VII is a legal remedy because the common law actions between master and servant "allowed compensatory damages for lost wages subsequent to the breach, but also imposed on the plaintiff a duty to mitigate, thus discouraging a windfall". *Id.* The Court referenced the decision in *Emmens v. Edlerton*, 10 Eng. Rep. 606, 615 (1853), which held that "after a dismissal, the servant or party employed may recover such damages as a jury may think the loss of the situation occasioned", but "[i]f he has obtained or is likely to obtain another situation, the damages ought to be less, or nominal, according to the real loss; and in such case the servant need not remain idle, in readiness to give services which cannot be wanted". *Id.* at 614.

[20]In *dicta*, the Court in *Terry* stated that it had previously "noted that back-pay sought from an employer under Title VII would generally be restitutionary", citing *Curtis v. Loether*, 94 S.Ct. at 1010. *Local No. 391 v. Terry, supra*, 110 S.Ct. at 1349. This was *dicta* on top of *dicta* because neither *Local No. 391* nor *Curtis v. Loether* was a Title VII case and the Court in both expressly stated that it was not deciding that Title VII is not protected by the Seventh Amendment. When examined in an actual case or controversy involving Title VII, such as here, it can be seen that back-pay under that statute is not restitutionary.

This Court has also said that back-pay under Title VII "deals with *legal* injuries of an economic character" and, as such, "the general rule is, that when a wrong has been done, and the law gives a remedy. the *compensation* shall be equal to the injury,". *Albermarle Paper Co. v. Moody, supra,* 422 U.S. at 418-419, 95 S.Ct. at 2372. [Quoting from *Wicker v. Hoppock,* 6 Wall 94, 99, 18 L.Ed. 752 (1867)] (emphasis supplied). These are common law principles of compensatory damages, rather than equitable principles of restitution.[21] See, *Curtis v. Loether, supra; Lorillard v. Pons, supra.*

The Sixth Circuit rejected the notion that back-pay is restitutionary in race discrimination claims brought under § 1981, and the decision's rationale is just as applicable to the same claims brought under Title VII. In *Setser v. Novack Inv. Co.,* 638 F.2d 1137, 1140-41 (6th Cir.), *cert. denied,* 454 U.S. 1064 (1981), the Court held:

> Some courts have attempted to liken back-pay to a form of restitution in order to characterize back-pay as equitable. (Citations omitted). Such characterization appears to us to misconceive the concept of res-

---

[21]It is true, of course, that the decision in *Albemarle Paper Co.* can be read to refer to back-pay as a part of a court's equitable powers, but the reference is ambiguous. More importantly, it was made in a completely different context than what is necessary for Seventh Amendment purposes. In *Albemarle Paper Co.* the Court was dealing with the structure of the *statutory* remedial scheme fashioned by Congress and appellate review of any discretion such scheme might leave on the courts, but was not considering whether such remedies would have been legal or equitable in 18th Century England for purposes of deciding whether the right to a jury trial had been "preserved" by the Seventh Amendment. See, *Granfinanciera, supra,* 109 S.Ct. at 795-96. In other cases, the Court has characterized Title VII as equitable in *dicta* solely for argument purposes in deciding whether statutes *other than Title VII* should be subject to the Seventh Amendment, but then expressly reserved the issue for Title VII itself to another day. Reliance on the *dicta* in *Lehman v. Nakshian,* 453 S.Ct. 156, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981), would be misplaced for the same reasons, as demonstrated by the court in *Beesley v. Hartford Fire Ins. Co., supra,* 723 F. Supp. at 643. See also, *Reiner v. State of New Jersey,* 732 F. Supp. 530, 534 (D.N.J. 1990).

> titution. In essence, restitution seeks to return to an injured party that which a wrongdoer has taken away. See, Restatement, Restitution, § 1-2 (1937). (Citations omitted). In many instances of § 1981 discrimination in an employment context, the injured party has not conferred any benefit on the alleged wrongdoer that would warrant a restitution recovery for back-pay. This is certainly true, as here, in a case of wrongful refusal to hire. But, it is also true in many situations of unlawful firings and unlawful failures to promote. See Comment, *Developments — Section 1981, supra,* 15 Har. Civ. Rights - Civ. Lib. L. Rev. at 250.
>
> In our view, the remedy of back-pay in § 1981 cases is more appropriately characterized as a compensatory, legal, damage. A number of district courts already have adopted this view. (citations omitted). We conclude that back-pay or lost wage determinations are inherently in the nature of legal damages. The calculations necessary to determine the hours of lost work stemming from a § 1981 violation are straight forward damage computations certainly within the practical capabilities of juries.

Setser v. Novack Inv. Co., supra, 638 F.2d at 1140-41. Accord, *Johnson v. Wolff's Clothiers, Inc.,* 663 F.2d 800, 804 (8th Cir. 1981). See also *Burke v. United States,* ___ F.2d ___ (6th Cir. 1991), holding Title VII back-pay is not taxable because it involves "damages on account of personal injury."

The holdings of this Court support the view of the Sixth and Eighth Circuits that back-pay under Title VII is not restitutionary in nature, but is compensatory for the injury done.[22] This Court held in *Tull, supra,* that "[r]estitution is

---

[22]As one commentator has stated, "[u]nlike a damage claim, restitution is aimed at forcing the defendant to disgorge benefits rather than at compensating the plaintiff". Gamble, *Alabama Law of Damages,* § 34-1, p. 385; *Citionelle — Mobile Gathering , Inc. v. O'Leary,* 499 F. Supp. 871 (S.D. Ala. 1980); *St. Regis Paper Co. v. Kerlin,* 476 So.2d 64 (Ala. 1985).

limited to 'restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant". *Tull v. United States,* 107 S.Ct. at 1839 [quoting *Porter v. Warner Holding Co.,* 328 U.S. 395, 402, 66 S.Ct. 1086, 1091, 90 L.Ed. 1332 (1946)].

Back-pay, however, does not restore the *status quo* because it awards the plaintiff something which he never had, i.e., the pay for a job he never held or performed, but would have held in the absence of the injury from the race discrimination. In no sense is the employer being required to disgorge profits or return matters to the *status quo* because a white person is the one who held the job or wage the black plaintiff was denied. The back-pay is not being disgorged from the white person who was profited by being hired or promoted instead of the black person.

Neither is the employer disgorging profits from the injury to the black person, but is instead paying *twice* for the same work; i.e., once to the white person who actually did the work and once in compensation to the black person who was not permitted to do it because of his race. This is true in all hiring and promotion cases where typically a white is selected instead of a black, as well as discharge and layoff cases where a white is retained in employment or replaces a black who has been wrongfully terminated. In each of these instances, the back-pay is not calculated as the profit of the employer which is then disgorged as in restitutionary cases, nor is it the exact amount of the pay of the job lost, but is instead calculated in accordance with normal common law damage principles where interim earnings are first deducted so that the back-pay is no more compensation than the actual losses caused by the racial discrimination. 42 U.S.C. § 2000e-5 (g); *Ochoa, supra,* at 918-919 ("It is of decisive significance to the present inquiry to note that Title VII literally codifies the common law measure of damages for wrongful discharge".).

Back-pay would not have been considered equitable in 18th Century England unless it clearly was not available at the common law as a compensatory damage, because equitable rem-

edies will not lie where there are adequate legal remedies. *Granfinanciera, supra,* 109 S.Ct. at 2793-2794 & n.7. Since back-pay was available at the common law as a compensatory damage in suits between master and servant in at least three types of causes of action, 18th Century England would not have permitted restitutionary back-pay as an equitable remedy. In *Granfinanciera, supra* at 2793-2794, the Court held that this "long settled rule that suits in equity will not be sustained where a complete remedy exists at law . . . 'serves to guard the right to trial by jury preserved by the Seventh Amendment and to that end should be liberally construed' ". *Granfinanciera, supra,* 109 S.Ct. at 2794 [quoting *Schoenthal v. Irving Trust Co.,* 287 U.S. 92, 94, 53 S.Ct. 50, 51, 77 L.Ed. 185 (1932)].[23]

Thus, restitution as an equitable remedy is confined solely to that form of relief (such as disgorgement of profits) *not* covered by compensatory damages, i.e., forms of relief in which an injury is not being compensated according to traditional legal principles of causation[24] and mitigation.[25]

---

[23]See also, *Beesley v. Hartford, supra; Dairy Queen v. Wood, supra,* 360 U.S. at 471-472, 82 S.Ct. at 896 ("In *Scott v. Neely,* decided in 1891 this Court held a court of equity could not even take jurisdiction of a suit 'in which a claim properly cognizable only at law is united in the same pleadings with a claim for equitable relief. That holding, ... was based upon both the historical separation between law and equity and the duty of the Court to insure 'that the right to a trial by a jury in the legal action may be preserved intact".).

[24]The causation principles of Title VII are similarly taken from the common law. For back-pay purposes it is not enough to prove intentional race discrimination or a violation of the Act; the plaintiff must go further and prove that the discrimination proximately caused his injury. See, *Price Waterhouse v. Hopkins,* 109 S.Ct. 1775, 1778 n.10 (1989); and *Lengen v. Department of Transp.,* 903 F.2d 1464, 1468 (11th Cir. 1990).

[25]At first glance it appears that the Court created a second exception to the general rule that monetary remedies are legal in nature when it stated in *Local No. 391 v. Terry,* that "a monetary award 'incidental to or intertwined with injunctive relief' may be equitable". *Id.* 110 S.Ct. at 1348 (quoting *Tull, supra,* 481 U.S. at 424, 107 S.Ct. at 1839.). But closer examination reveals that the Court was merely making the same point as it had in the *Tull* decision from which it was quoting, i.e., that while the back-pay claim may be "incidental to or intertwined with injunctive relief", it does not lose the

Proximate cause of this type is a principle taken directly from the common law's treatment of compensatory damages and is unlike equitable remedies which seek to vindicate the violation of the law itself without regard to whether the violation proximately caused an injury which must be compensated by damages.[26]

The Court in *Local No. 391 v. Terry, supra,* also held that back-pay was not restitutionary because "[t]he back-pay sought

---

protection of the Seventh Amendment because "if a legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact" and "[t]he right cannot be abridged by characterizing the legal claim as 'incidental' to the equitable relief sought". *Tull v. United States, supra,* 107 S.Ct. at 1839 [quoting *Curtis v. Loether, supra,* 415 U.S. at 196 n.14, 94 S.Ct. at 1009 n.11]. See also, *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959); *Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 470-473, 82 S.Ct. 894, 896-97, 8 L.Ed.2d 44 (1962); *Reiner v. State of New Jersey,* 732 F. Supp. 530, 533 (D.N.J. 1990); *Beesley v. Hartford,* 723 F. Supp. at 638-639. The decision in *Local No. 391 v. Terry* must be read in this manner because otherwise it would irreconcilably conflict with the very holding it was quoting from (*Tull*) and from a longstanding series of holdings which the Supreme Court did not suggest that it was overruling. (*Curtis, Beacon Theatres, Dairy Queen*). Because the situation in *Local No. 391 v. Terry* did not involve back-pay that was incidental to or intertwined with injunctive relief, the Court did not venture to completely restate the principle of *Tull* and those other prior cases, but was content to note that this concept of incidental damages was simply inapplicable to the case before it. *Local No. 391 v. Terry, supra,* 110 S.Ct. at 1348 ("Because respondents seek only money damages, this characteristic is clearly absent from the case".). As such, *Local No. 391 v. Terry* was *dicta* on this point and the law remains that the Seventh Amendment right "cannot be abridged by characterizing the legal claim as 'incidental' to the equitable relief sought". *Tull, supra,* 107 S.Ct. at 1831; *Curtis v. Loether,* 415 S.Ct. at 196 n.11, 94 S.Ct. at 1009 n.11; *Reiner, supra,* 732 F. Supp. at 533.

[26]See, Gamble, *Alabama Law of Damages,* § 34-1, p. 385 ("The measure of defendant's liability in restitution is the value of the benefit he received whether it is equal to, less than, or greater than the plaintiff's loss".); *Opelika Production Credit Association, Inc. v. Lamb,* 361 So.2d 95, 92-99 (Ala. 1978). None of these principles of mitigation or causation are applicable to restitution which seeks to restore the *status quo* rather than compensate for injury. *Tull v. United States, supra.*

by respondents is not money wrongfully held by the Union, but wages and benefits they would have received from McLean had the Union processed the employer's grievance properly and, thus '[s]uch relief is not restitutionary' ". *Local #391 v. Terry, supra,* 110 S.Ct. at 1348. This is also true of back-pay in many types of Title VII actions which are brought against Unions, personnel agencies and other non-employers seeking compensation for the wages lost from the employer because of the non-employer's discrimination.[27] Such back-pay cannot be restitutionary any more than it was in *Local #391 v. Terry* because it does not restore anything which the defendant Union or agent withheld.

Similarly, the courts have recognized that a former employer can be liable under Title VII if it causes a prospective new employer not to hire someone because of racial discrimination. *Bailey v. USX Corp.,* 850 F.2d 1506, 1509 (11th Cir. 1988). Such liability would be purely compensatory, not restitutionary, since it pays the employee for losses from non-employment with a third party, and does not restore anything which the defendant-employer had taken from the employee.

Merely labeling damages as restitutionary does not make them equitable because "[r]estitutionary recovery is suited equally to actions at law and in equity and is characterized as legal or equitable depending upon the nature of the rights to be redressed". Gamble, *Alabama Law of Damages,* § 34-1, p. 385 (1982); *Palstorff v. Fletcher,* 430 F. Supp. 592 (N.D. Ala. 1977). See, *Setser v. Novack Inv. Co.,* 638 F.2d 1142 n.9 (6th Cir.), *cert. denied,* 454 U.S. 1064 (1981) ("Indeed restitution is suited both to actions at law and in equity depending upon the nature of the rights sought to be vindicated".).

---

[27]Title VII permits suit against Unions and agents, including personnel agencies, liable for back-pay lost from an employer because of the Unions or agents' discrimination. 42 U.S.C. § 2000e-2 (b) & (c). See, *Cary v. Greyhound Bus Co., Inc.,* 500 F.2d 1372 (5th Cir. 1974); *Sabala v. Western Gillette, Inc.,* 516 F.2d 1251 (5th Cir. 1975); *Mills v. Intern. Broth. of Teamsters Etc.,* 634 F.2d 282 (5th Cir. 1981); *Sears v. Atchison, T & F.S. Ry. Co.,* 645 F.2d 1365 (5th Cir. 1981).

The Restatement of Restitution traces the historical roots of restitution through the common law and equity courts and states that "[t]he earliest proceedings in common law courts were restitutionary in nature" such that damages "were conceived of as restoring to the plaintiff that to which he was entitled". *Restatement of Restitution*, pp. 5-6 (1937). While the equity courts began to fill in some of the gaps in restitution left by the common law, "gradually the common law judges become conscious of their omissions and jealous of the expanding power of the Court of Chancery, and with the invention of the action of assumpsit that found a means of expanding their jurisdiction" as early as the 15th Century. *Id.* at pp. 6-7. Through gradual expansion of assumpsit in the next two centuries, the common law courts developed a complete system of restitutionary remedies and damages which displaced the equity courts by the 18th Century in many areas of restitution. *Id.* at pp. 8-10. In other areas, "the two courts had concurrent jurisdiction", but in no sense could restitutionary damages be said to be exclusively equitable by the time the Seventh Amendment was adopted. *Id.*

Thus, Section 4 of the Restatement of Restitution states that "[i]n situations in which a person is entitled to restitution, he is entitled to one or more of the following remedies . . . (b) a judgment *by a court of law* enforced by a writ directing a sheriff or other officer of the court to seize and restore the subject to him . . . (f) a judgment *at law* or decree in equity for the payment of money directly or by way of set-off or counterclaim". *Id.* at pp. 17-18. The Restatement then explains that "[a]lthough ordinarily such money judgment is obtained by an action of law, a decree for money will sometimes be rendered by a court of equity". *Id.* at p. 21.

As to the form of an action for such a restitutionary judgment, the Restatement states that "[t]he appropriate proceeding in an action at law for the payment of money by way of restitution in states retaining common law forms of action, [is] an action of general assumpsit". *Id.* at § 4, p. 22. This is also true in 18th Century England. *Id.* at pp. 5-9. See also, Comment, *The Seventh*

Amendment and Civil Rights Statutes: History Adrift In A Maelstrom, 68 Northwestern U.L.R. 503, 526 n.121 & n.125 (1973).

Restitution also does not serve to deter violators or to assure prompt compliance with the laws. *Tull v. United States, supra*, 107 S.Ct. at 1838-1839. Back-pay in Title VII, however, serves those purposes. See, *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417, 95 S.Ct. 2362, 2371-72, 45 L.Ed.2d 280 (1975). Such purposes are foreign to restitution, which merely aims at restoring the *status quo*, rather than deterring future violations and prompting *change* in the *status quo* and compliance with the law. See, *Tull v. United States, supra*, 107 S.Ct. at 1838-1839.

Lastly, nominal damages are available under Title VII and are clearly a legal, not equitable, remedy. *Beesley v. Hartford Fire Ins. Co., supra*, 723 F. Supp. at 640 [citing *Bancroft v. Taylor*, 91 F.2d 579 (5th Cir. 1937)].

3. The Congressional Characterization Does Not Control: The language of Title VII is ambiguous at best in characterizing the nature of the relief allowed.[28] Title VII does not directly label back-pay to be an equitable remedy,[29] but instead

---

[28] *Ochoa v. American Oil Co.*, 338 F. Supp. 914, 915 n.2 (S.D. Tex. 1972) ["The legislative history on this point [of a jury trial in Title VII actions] is equivocal. See, *Culpepper v. Reynolds Metal Co.*, 296 F. Supp. 1232, 1239 n.5 (N.D. Ga. 1986), *rev'd on other grounds*, 421 F.2d 888 (5th Cir. 1970)"].

[29] The court below convincingly demonstrated why the use of the word "court" in Title VII does not exclude a jury as a factfinder in *Beesley v. Hartford Fire Ins. Co.*, 723 F. Supp. 635, 638-639 (N.D. Ala. 1989). The defendant has not argued otherwise. See also, *Sibley v. Fulton DeKalb Collection Services*, 677 F.2d 830, 832-833 (11th Cir. 1982) ("It has been frequently determined, however, that the word 'court' used in the Act and in the remedial portions of numerous other statutes, encompasses trial by both judge and jury rather than by judge alone".). *Wirtz v. Jones*, 340 F.2d 901, 904 (5th Cir. 1965); *Pons v. Lorillard*, 549 F.2d 950, 952 (4th CIr. 1977), *aff'd*, 434 U.S. 575, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978); *Rogers v. Loether*, 467 F.2d 1110, 1122-1123 (7th Cir. 1972), *aff'd sub nom. Curtis v. Loether*, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974); *Cf. Gnosses Music v. Mitken, Inc.*, 653 F.2d 117, 119 (4th Cir. 1981) ("Court could mean either 'judges' singularly or "judge and jury" in tandem".); *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 225 n.26 (4th Cir.) (same conclusion), *cert. denied*, 439 U.S. 934, 99 S.Ct. 329, 58 L.Ed.2d 330 (1978).

simply says that the relief awarded "may include, *but is not limited to* . . . any other equitable relief". 42 U.S.C. § 2000e-5 (g) (emphasis added). The statute goes on to define back-pay in the next three sentences in terms of principles of causation, limitations, and mitigation which are taken directly from common law principles of compensatory damages.

This Court has held that the label which Congress puts on the remedies it provides, and the refusal to provide a *statutory* right to jury trials, is not dispositive as to whether there is a *constitutional* right to such trials protected by the Seventh Amendment.[30] See, *Granfinanciera, infra,* 109 S.Ct. 2795; *Ross v. Bernhard,* 396 U.S. 531, 538, 90 S.Ct. 733, 738 (1970); *Sibley v. Fulton DeKalb Collection Services,* 677 F.2d 830, 832 (11th Cir. 1982) (Recognizing Constitutional right to jury trial despite silence of statute on subject and use of word "court" in describing who would award remedies.). See also *Yellow Freight System, Inc. v. Donnelly,* ___ U.S. ___, 110 S.Ct. 1566, 108 L.Ed.2d 834 (1990), in which this Court held unanimously

---

[30]Title VII allows cases which seek *only* injunctive relief and, for this reason, a statutory right to jury trial in *all* Title VII actions may have been inadvisable to Congress. The fact that *all* Title VII cases do not have a statutory right to trial by jury, however, does not mean that *some* of those actions are not protected by the Constitutional right to a jury trial when they seek monetary remedies which were traditionally awardable only by courts of law, not equity. *Curtis v. Loether,* 415 U.S. 189, 196 n.11, 94 S.Ct. 1005, 1009 n.11 (1974); *Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 470-73, 82 S.Ct. 894, 896-97, 8 L.Ed.2d 44 (1962). Because the Seventh Amendment exists to protect the right to a jury trial in the latter type of Title VII action which primarily seeks money damages, a statutory right would have been redundant for that type of case and, for this reason, the absence of a right to a jury trial in the Act cannot be read to indicate that Congress did not intend for there to be such a right or right in that class of cases which were protected by the Seventh Amendment. In other words, Congress did not need to do that which the Seventh Amendment already did. See, *Sibley v. Fulton DeKalb Collection Services,* 677 F.2d 830, 832 (11th Cir. 1982) (The absence of a statutory right to jury trial "equally supports an argument inimical to Fulton's position: that Congress finds it necessary to provide expressly for the right to trial by jury only when the right would not exist but for that express provision".).

that state courts have concurrent jurisdiction over actions brought under Title VII. The Court relied on the absence of any language in Title VII placing jurisdiction over Title VII actions exclusively in the federal courts, despite the admitted fact "that most legislators, judges, and administrators who have been involved in the enactment, amendment, enforcement, and interpretation of Title VII expected that such litigation would be processed exclusively in the federal courts." *Id.*, 110 S.Ct. at 1570. In other words, conventional wisdom does not always equate with proper statutory construction and with correct constitutional interpretation. Title VII is just as silent about who is to be the trier-of-fact as it is about which courts are to have jurisdiction. Thus, the Court will look to the Constitution for guidance, just as it did in *Yellow Freight,* where the dual court system provided in the Constitution was crucial.

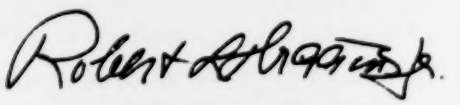
In *Granfinanciera, S.A. v. Nordberg,* 109 S.Ct. 2792, 2795 (1989), the Court held that there was a constitutional right to a jury trial despite a *statutory* rejection of such trials by Congress. The Court held that Congress "lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury" because "to hold otherwise would be to permit Congress to eviscerate the Seventh Amendment's guarantee by assigning to administrative agencies or courts of equity all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common law forbears". *Id.* 109 S.Ct. at 2795. The Court held that "[t]he Constitution nowhere grants Congress such puissant authority". *Id.* In rejecting the Congressional characterization as controlling, the Court reiterated that " 'legal claims are not magically converted into equitable issues by their presentation to a court of equity, nor can Congress conjure away the Seventh Amendment by mandating that traditional legal claims be brought there or taken to an administrative tribunal' ". *Id.* 109 S.Ct. at 2795-2796 (quoting from *Ross v. Bernhard,* 396 U.S. 531, 538, 90 S.Ct. 733, 738, 24 L.Ed.2d 729 (1970)). See also, *Scott v. Neely,* 140 U.S. 106 (1981); *Whitehead v. Shattuck,* 138 U.S. 146 (1991); *Dairy Queen,*

Inc. v. Wood, 369 U.S. 469, 470-471, 82 S.Ct. 894, 896, 8 L.Ed.2d 44 (1962); *Beelsey v. Hartford Fire Ins. Co., supra*, 723 F. Supp. at 639 ("By the simple device of characterizing a remedy as 'legal' in one statute and as 'equitable' in another statute, Congress, if permitted to do so, could simultaneously abrogate the Seventh Amendment and Rule 38 (a), F.R.Civ.P., in any newly created cause of action".).

CONCLUSION

The petition should be granted.

Respectfully submitted,



ROBERT L. WIGGINS, JR.
Counsel of Record
Attorney for Petitioner

OF COUNSEL:

Gordon, Silberman, Wiggins
and Childs, P.C.
1400 SouthTrust Tower
Birmingham, Alabama 35203
(205) 328-0640

CERTIFICATE OF SERVICE

This is to certify that a copy of the above and foregoing has been served by United States mail, postage prepaid and properly addressed to Mr. James P. Alexander and Mr. John Hargrove, Attorneys at Law, 1400 Park Place Tower, Birmingham, Alabama 35203.

This the 21st day of June, 1991.

Robert L. Wiggins, Jr.

ROBERT L. WIGGINS, JR.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

REGINA THOMAS WALTON,	)	
	)	
Plaintiff	)	
	)	CIVIL ACTION NO.
VS.	)	89-AR-0263-S
	)	
COWIN EQUIPMENT	)	
COMPANY, INC.,	)	
	)	
Defendant	)	
	)	

ORDER

The court has for consideration the motion of plaintiff, Regina Thomas Walton, for trial by jury. In view of this court's opinions in *Beesley v. The Hartford Fire Insurance Company*, CV 89-AR-1062-S, the court exercises its discretion in favor of plaintiff, and her motion is hereby GRANTED.

DONE this 18th day of October, 1989.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

REGINA THOMAS WALTON,	)	
	)	
Plaintiff	)	
	)	CIVIL ACTION NO.
VS.	)	89-AR-0263-S
	)	
COWIN EQUIPMENT COMPANY, INC.,	)	
	)	
Defendant	)	
	)	

MEMORANDUM OPINION

This action was brought by Regina Thomas Walton against Cowin Equipment Company, Inc., Walton's employer, under both 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964 as amended (42 U.S.C. §§ 2000e, *et seq.*). Walton, a black female and long-time Cowin employee, claimed that because of her race she received a rate of pay lower than white employees who performed substantially similar work. She also claimed that she had been retaliated against by Cowin in response to her having filed an EEOC charge.

At the time Walton filed her action, the federal court consensus was that she had a right to invoke 42 U.S.C. § 1981 and Title VII as dual methods for presenting her complaint of racial discrimination in private employment. Section 1981 clearly provided her a right to trial by jury, a right which she exercised. Walton's claim under § 1981 suddenly evaporated with *Patterson v. McLean Credit Union*, ____ U.S. ____, 109 S.Ct. 2363 (1989), causing a mid-course correction. Cowin moved for and was granted partial summary judgment (based on

Patterson), knocking out the § 1981 aspect. Cowin also moved to strike Walton's jury demand. The court followed the reasoning and the authorities it had relied upon in *Beesley v. The Hartford Fire Insurance Company*, 717 F. Supp. 781 (N.D. Ala. 1989), reconsidered at 723 F. Supp. 635 (N.D. Ala. 1989), and denied Cowin's motion.

Walton's Title VII claim was tried to a jury composed of one while male, one black male, four white females, and one black female. No objection was voiced by either party to the other party's preemptory strikes during the selection of these seven jurors. After hearing the evidence and the court's instructions,[1] the jury found that Cowin had discriminated against Walton by paying her less for work substantially similar to work performed by one or more white employees. The jury awarded damages in the amount of $14,622.40. The court directed a verdict in favor of Cowin on Walton's separate claim of retaliation, finding that Walton had not presented evidence of retaliation meeting the substantiality test of *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969).

The court now has for consideration Cowin's alternative motion for judgment notwithstanding the verdict or for a new trial. It asks this court to rethink and, after rethinking, to repudiate *Beesley*, in light of *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir. 1990), decided after *Beesley*. It is reasonable to request another reconsideration of *Beesley*. This court must do its best to reevaluate the jury trial issue by ascertaining the meaning of *Sherman*, which, incidentally, is now pending in the Eleventh Circuit on suggestion for rehearing *en banc*. This court must also consider the lessons, if any, in *Teamsters, Local No. 391 v. Terry*, ____ U.S. ____, ____ S.Ct. ____, 1990 WL 27960, 58 U.S.L.W. 4345 (1990); and in *Lytle v. Household Manufacturing, Inc.*, ____ U.S. ____, ____ S.Ct. ____,

---

[1]The court borrowed largely from the instructions in Equal Pay Act cases as contained in the newly published "Eleventh Circuit Pattern Jury Instructions in Civil Case." The court, of course, substituted "race" for "sex" as the motivating factor for the claimed pay disparity.

1990 WL 27959, 58 U.S.L.W. 4341 (1990), both decided by the Supreme Court after *Beesley* and after *Sherman*.

In another case now before this court involving a motion to strike a jury demand in a Title VII case, Cowin's counsel filed a brief which is consistent with the position they now take on behalf of Cowin. That brief contends that *Sherman* effectively wipes *Beesley* from the books.[2] In effect, Cowin's counsel argue

---

[2]Defendant's brief in *Tyrone Davis v. McRae's of Alabama, Inc.*, CV 89-AR-1921-S, pp. 2-3, argues:

> First, the United States Supreme Court has recognized that there is no right to a jury trial under Title VII. *See Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366, 375 (1979) (noting that "[b]ecause [Title VII] expressly authorized only equitable remedies, the courts have consistently held that neither party has a right to a jury trial"); *see also Curtis v. Loether*, 415 U.S. 189, 197-98 (1974). Furthermore, the Eleventh Circuit has stated:
>
> > Since Title VII cases are entirely in equity there is no right to a jury trial, even when the claimant seeks back pay.
>
> *Wilson v. City of Aliceville*, 779 F.2d 631, 635 (11th Cir. 1986); *Sullivan v. School Board of Pinellas County*, 773 F.2d 1182, 1187 (11th Cir. 1985); *see also Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969); *B. Schlei & P. Grossman, Employment Discrimination Law* 1135 (1983 and Supp. 1983-85). In fact, the Eleventh Circuit has held, as recently as January, 1990, that a Title VII plaintiff is not entitled to a jury trial. *See Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1529 at n. 4 (11th Cir. 1990). This is the law of the other federal circuits as well. *See, e.g., Shah v. Mount Zion Hospital & Medical Center*, 642 F.2d 268 (9th Cir. 1981); *Grayson v. Wickes Corp.*, 607 F.2d 1194 (7th Cir. 1979); *United States v. Lee Way Motor Freight*, 625 F.2d 918 (10th Cir. 1979).
>
> Cases holding that no right to a jury trial exists under Title VII rely primarily upon the fact that remedies available under Title VII, by statutory prescription, are equitable in nature. *See* 42 U.S.C. § 2000e-5(g); *see also Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1529 at n. 4. Thus, since Title VII itself does not provide for a trial by jury, the courts consistently have held that actions brought pursuant to Title VII and its equitable remedial scheme are not subject to the Seventh Amendment's guarantee of a jury trial and thus should be tried to the bench. *See, e.g., Johnson v. Georgia Highway Express, Inc.*, 417 F.2d at 1125.

that this court's opinions in *Beesley* have been vicariously reversed by *Sherman*.

The court finds interesting the fact that Cowin's counsel, appearing for another client in yet another case wherein they represent a *plaintiff* before this very court, have filed a brief in support of a request for a jury trial. Of all things, Cowin's counsel cites this court's *Beesley* opinions as authority for the right to a jury trial in a statutorily created cause of action where the statute itself is silent on the subject.[3] Admittedly that

---

[3]Plaintiff's brief in *Flowers Family Bakeries, Inc. v. Mills Family Bakery of Alabama, Inc.*, CV 89-AR-1854-S, pp. 1-3, argues:

> The right to a trial by jury in the federal court system is a basic and fundamental right, and a party's request for a jury trial should be granted in the absence of the opposing party's ability to overcome its high burden of proof. The Federal Rules of Civil Procedure ("FRCP") have demonstrated this strong public policy toward granting a party's request for a jury trial in FRCP Rule 38. Rule 38 provides that a party may have a trial by jury as a matter of right whenever such party demands a jury trial within ten days after service of the last pleading directed to an issue triable by jury. Additionally, Rule 39(b) provides that "the court in its discretion upon motion may order a trial by jury of any or all issues." FRCP Rule 39. Flowers Family Bakers has moved this court to exercise its discretion and order a trial by jury in the above-styled action.
>
> In considering a request for a jury trial, the court generally "should grant a jury trial in the absence of a strong compelling reason to the contrary." *Swofford v. B&W, Inc.*, 336 F.2d 406, 408 (5th Cir. 1964), *cert. denied*, 379 U.S. 972 (1965). The Eleventh Circuit has more recently reiterated this fundamental premise of civil procedure when, in *Parrott v. Wilson*, 707 F.2d 1262 (11th Cir. 1983), *cert. denied*, 464 U.S. 936 (1984), the court stated that "[i]n this circuit, the general rule governing belated jury requests under Rule 39(b) is that the trial court 'should grant a jury trial on the absence of compelling reasons to the contrary.' " *Id.* at 1267 (citing *Swofford, supra*); *see also, generally, Jordan v. Reliable Life Ins. Co.*, 716 F. Supp. 582, 583-85, n.1 (N.D. Ala. 1989) (Acker, J.).
>
> In reviewing a Rule 39(b) motion, the court may consider several balancing factors to aid its decision. Among these factors is included: (1) whether the case involves issues which are best tried to a jury; (2) the possible disruption to the court's schedule; (3) prejudice to the

case is a trademark infringement case, but the predominant relief there sought is equitable. There is, of course, nothing inherently wrong with ambidexterity in an advocate. The ability to argue both sides of a question, depending upon whose ox is being gored, is a lawyer's blessing. This court only mentions the same lawyers' differing opinions about *Beesley* as an illustration of the fact that the issue dealt with by this court twice in *Beesley* was apparently not entirely settled by *Sherman*, even before *Local 391* and *Lytle* were simultaneously decided by the Supreme Court on March 20, 1990.

Although there has been no ruling on application for rehearing in *Sherman*, this court will, for the purposes of this opinion, treat the opinion in *Sherman* rendered on January 10, 1990, as if it will survive that application intact. Because *Local 391* and *Lytle* were not decided until March 20, 1990, it was, of

---

adverse party; (4) the length of delay before requesting a trial by jury; and (5) the reasons for any tardiness. *Parrott*, 707 F.2d at 1267. All of these factors dictate that a trial by jury is appropriate in this case.

First, while Flowers Family Bakeries does not deny that it has asked this court to enjoin the defendants from all future infringement upon its ownership of the trademark HOLSOM, it is equally important to note that this case involves the important issues of damages which Flowers Family Bakers has already suffered due to the defendants' actions which have infringed upon Flowers Family Bakers' trademark. The United States Supreme Court has held, since 1962, that mixed legal and equitable issues in a case do not prevent the plaintiff's request for a trial by jury. *Dairy Queen v. Wood*, 369 U.S. 469 (1962) [footnote omitted]. Indeed, "[a] party with a claim for money damages, as opposed solely to equitable relief, has a Constitutional right to trial by jury." *Mastercard International, Inc. v. Arbel Corp.*, No. 86 CV 6801 SWK (S.D. N.Y. Oct. 18, 1989) (1989 WESTLAW 125781) (citing *Dairy Queen, supra*). *See also Beesley v. Hartford Fire Ins. Co.*, 723 F. Supp. 635, 638 (N.D. Ala. 1989) (Acker, J.) ("This necessarily implies that the right to trial by jury shares that certain sanctity which permeated the entire Bill of Rights"); *Beesley v. Hartford Fire Ins. Co.*, 717 F. Supp. 781, 783 (N.D. Ala. 1989) (Acker, J.) ("[T]he present Supreme Court's recognition of the overriding importance of the Seventh Amendment's absolute guarantee of trial by jury in all cases not historically considered equitable" has made the Seventh Amendment one of the most important Bill of Rights guarantees).

course, impossible for the Eleventh Circuit to consider them, and, of course, the Eleventh Circuit in *Sherman* was not being asked to review *Beesley*.

There are some striking parallels both in the facts and in the procedural postures among *Sherman, Lytle*, and the instant case. In all three cases the plaintiff was black and was complaining of employment discrimination based on race. In all three the plaintiff initially invoked both Title VII and § 1981. In all three the plaintiff demanded a jury trial. In all three *Patterson* had the potential for eliminating plaintiff's § 1981 claim, which would clearly carry the right to a jury trial. On these facts, the Supreme Court in *Lytle* parts ways with the Eleventh Circuit in *Sherman*. In *Sherman*, both the Title VII dispute and the § 1981 dispute had been simultaneously tried to a jury, pre-*Patterson*. The Eleventh Circuit pointed out that the trial court had "instructed the jury on the elements of a section 2000e-2(a)(1) claim and asked it to answer the following question: '(1). Was the race of the plaintiff . . . or the fact of his marriage to Debbie Sherman [a white woman], a substantial motivating factor in any decision to terminate his employment . . . ?'" 891 F.2d at ____ (brackets in original). Thereupon, the *Sherman* jury rendered plaintiff's verdicts of $10,000 in compensatory damages and $12,500 in punitive damages. The trial court then entered judgment against Sherman's employer in the jury-determined amount of $22,500. On motion for a new trial, the trial court in *Sherman* entered the following order:

> Willie Lewis Sherman, the prevailing party in the above-captioned case, asks the Court to "clarify" the judgment entered in this case on February 29, 1988, following a two-day jury trial. The jury's findings of fact [i.e., its answer to question three], of course, related solely to plaintiff's causes of action [against Burke] under 42 U.S.C. § 1981. In view of the need to demonstrate a proper regard for the vital and necessary function of the jury in our judicial system, I am prepared to accept and adopt as my own these

> findings with respect to Sherman's Title VII claim [under section 2000e-3(a)] as well and to award him no further relief than that provided for under the verdict. Judgment is hereby entered accordingly [in the sum of $22,500].

Id. at ____ (brackets in original but footnote omitted).

On appeal to the Eleventh Circuit neither party complained about the trial court's perfunctory use of the jury's response to the question posed under § 1981 in deciding the § 2000e-3(a) claim, and neither party raised an objection to the trial court's failure to make specific findings of fact and written conclusions of law. A panel composed of Chief Judge Tjoflat, Judge Edmondson and Senior District Judge Atkins held, *sua sponte,* that *Patterson,* even though decided after the trial of Sherman's action, had succeeded in an *ab initio,* after-the-fact elimination of Sherman's claim insofar as based on § 1981:

> . . . in accordance with the mandate in *Patterson,* we hold that Sherman has no cause of action under section 1981.

Id. at ____.

Based on this finding, the Eleventh Circuit set aside the jury's punitive award, saying:

> Unlike section 1981, which allows for punitive as well as compensatory damages, *see Johnson v. Railway Express Agency,* 421 U.S. 454, 460, 95 S.Ct. 1716, 1720, 44 L.Ed. 2d 295 (1975), Title VII limits a plaintiff to "equitable monetary relief" such as lost wages and work benefits, *see Walker v. Ford Motor Co.,* 684 F.2d 1355, 1364 & n. 16 (11th Cir. 1982). We therefore hold that Sherman is not entitled to punitive damages for his Title VII retaliation claim and, accordingly, vacate the $12,500 award of punitive damages entered against Burke.
>
> * * *
>
> . . . we affirm the award of $10,000 in *compensatory damages* under 42 U.S.C. § 2000e-3(a) (1982) but

> vacate the award of $12,500 in punitive damages under section 2000e-3(a).

Id. at ____ (emphasis supplied).[4]

The Eleventh Circuit's express description in *Sherman* of the $10,000 award as *"compensatory damages"* is significant not only because of the court's pointed choice of words but because the Eleventh Circuit allowed $10,000 in "compensatory damages" to stand even though it had clearly been fixed *by a jury* in a Title VII case. This is consistent with what the Eleventh Circuit said in *Verhaeken v. Westinghouse Elec. Corp.*, 881 F.2d 1041 (11th Cir. 1989), mentioned by this court in *Beesley*. This court has found no decision which has ever even hinted, much less held, that "compensatory damages" is a form of "equitable relief." Unless Congress is empowered to make "black" into "white" by the simple device of renaming the two to suit some salutary purpose, a "legal remedy" cannot be converted into "equitable relief" by calling it "equitable." If Congress has this power, it can abrogate the Seventh Amendment by an easy-to-draft statutory declaration that all former "legal" actions shall henceforward be deemed "equitable." There might some day be a Congress which will want to do away entirely with jury trials in civil cases. For doing away with one of the Bill of Rights, if it can be done, a statute would be much easier than a constitutional amendment. It is possible, for instance, that some future Congress might become even more worried than the present Congress over the increasing cost of summoning and paying jurors and over the federal judicial system's failure to meet the public's demand for expedition in civil case management, and that such a Congress could manifest by statute

---

[4]This court is unsure if there is any lesson in *McGinnis v. Ingram Equipment Co., Inc.*, 888 F.2d 109 (11th Cir. 1989), for the subject at hand. *McGinnis*, like *Sherman*, dealt with *Patterson*, but the panel opinion of November 14, 1989, in *McGinnis*, was vacated on February 6, 1990, and *McGinnis* will now go to *en banc* rehearing. What the full Eleventh Circuit will say in *McGinnis*, if anything, on the continued viability of a § 1981 claim in the private employment context, post-*Patterson*, will come too late for use in this opinion.

its disagreement with *Armster v. United States Dist. Court,* 792 F.2d 1423 (9th Cir. 1986), which held that the Seventh Amendment absolutely prohibits the suspension of the operation of the civil jury system for lack of funds.

There is still more to be deduced from *Sherman.* Chief Judge Tjoflat wrote a special concurrence reflecting his unhappiness with a central pronouncement in *Bailey v. USX Corp.,* 850 F.2d 1506 (11th Cir. 1988). *Bailey* was written by then Chief Judge Roney who told this very court that it was incorrect when it held that a *former* employee could not sue his *former* employer under Title VII for damages resulting from a post-termination act of retaliation by the *former* employer. In *Bailey* the plaintiff had sought what can only be described fairly as "legal" relief. He alleged that USX, his former employer, had deliberately "bad-mouthed" him to prospective employers, effectively preventing him from obtaining employment for a period of time after his termination by USX. *Bailey* could certainly not be described as a typical "back pay" Title VII case. In *Bailey* the only claim was for money, designed to compensate Bailey for the loss which he claimed had resulted from the blacklisting. In *Sherman* Chief Judge Tjoflat, although writing pre-*Lytle,* obviously understood very well that Bailey's claimed remedy was purely legal, but that former Chief Judge Roney, in an opinion binding upon Chief Judge Tjoflat, had found Bailey's remedy to be one *implied* by Title VII. Chief Judge Tjoflat knew that Bailey's claim, as described in *Bailey,* would have carried a jury trial if Bailey had invoked the Seventh Amendment. Chief Judge Tjoflat's concurrence in *Sherman* makes plain the quandary in which he found himself, and in which any judge would find himself if he believes that all Title VII remedies are by statutory definition "equitable" and therefore cannot be tried to a jury. Another problem, or perhaps an aspect of the same problem, is manifest in the $10,000 verdict and judgment, which the Eleventh Circuit affirmed in *Sherman.* According to the employer's brief in support of its current application for rehearing in *Sherman,* "both parties recognized that the amount of lost back wages was substantially less than $10,000,"

a fact which means that the jury added something for mental anguish. This is the only possible explanation for the nice round figure, $10,000. Despite these problems inherent in *Bailey*, problems fully comprehended by Chief Judge Tjoflat, the panel in *Sherman* expressed in *dictum* its belief that Title VII cases are not jury-triable. Because the issue was not raised in *Sherman*, either in the district court or in the Eleventh Circuit, the panel's expressions on the subject of jury trial were *dicta*. Repeating its earlier gratuitous belief in no jury trials in Title VII cases, the panel in *Sherman* said:

> Sherman, however, had no right to a jury trial of his section 2000e-2(a)(1) claim. The law provides that such a claim lies in equity, *See* 42 U.S.C. § 2000e-5(g) (1982) (limiting an employee's relief under Title VII to injunction against unlawful employment practices and reinstatement, back pay, or any other equitable relief as court deems appropriate). Thus, regarding Sherman's section 2000e-2(a)(1) claim, the jury could serve in an advisory capacity only. *See* Fed.R.Civ.P. 39(c). In sum, the jury's verdict bound the court on the section 1981 claim but not on the section 2000e-3(2) claim.

891 F.2d at ____, n. 4.

Although this is *dictum*, it does accurately reflect prior Eleventh Circuit precedent. *See Johnson v. Georgia Highway Express, Inc.*, 407 F.2d 1122 (5th Cir. 1969). The question for this court is not whether the panel in *Sherman* correctly recites Eleventh Circuit precedent, but whether this Eleventh Circuit precedent has been undercut by subsequent pronouncements of the Supreme Court in a way that releases this court to follow an ascertainable Supreme Court lead in a new direction.

The court apologizes to the world in general, and to the parties in *Beesley* in particular, for not having recognized or not having remembered the message implicit in *Bailey* before writing the *Beesley* opinions. Of all courts, this court should have seen what Chief Judge Tjoflat saw in *Bailey*, and should have articulated it in its *Beesley* opinions.

If and when the Eleventh Circuit next speaks on the subject of the right to a jury trial in a Title VII case, the Eleventh Circuit will not only have to face the dilemma which Chief Judge Tjoflat recognized was created in *Bailey*, but will have available the following statement by the Supreme Court in *Lytle*.

> Under Fourth Circuit precedent, a plaintiff does not have a right to a jury trial on a Title VII claim. *See Keller v. Prince George's County*, 827 F.2d 952, 955 (1987). *This Court has not ruled on the question whether a plaintiff seeking relief under Title VII has a right to a jury trial. See Chauffeurs, Teamsters and Helpers v. Terry*, 493 U.S. ____, ____ (1990). Because Lytle does not argue that he was entitled to a jury trial on his Title VII claims, we express no opinion on that issue here. Instead, we assume for purposes of this opinion that he has no such right.

____ S.Ct. at ____, n.1 (emphasis supplied).

The Supreme Court now makes it quite plain that Cowin's counsel misspoke when they categorically pronounced that the Supreme Court has "recognized that there is not right to a jury trial under Title VII." See footnote 2, *supra*. In *Lytle* the Supreme Court exhaustively discussed the same line of current Supreme Court cases which this court discussed in its two *Beesley* opinions, but which were not discussed in *Sherman*. *Lytle* holds, if it holds nothing else, that in a case involving both a § 1981 claim and a Title VII claim, a jury trial cannot be avoided by the expedient of first conducting a bench trial on the Title VII claim and then finding the non-jury result determinative of the same factual dispute in the § 1981 claim. This confirms what this court said in *Beesley* about *Patterson*. *See* 723 F. Supp. at 646. It is now clear that if a party has a right to jury trial on any issue involving a factual dispute, whether a federal claim or a pendent state claim, the said issue must be decided by a jury if a jury is demanded. This is the mandate both of the Seventh Amendment and of *Lytle*. To reiterate, according to

Lytle the party demanding a jury trial cannot be precluded by a prior non-jury determination of a jury issue.[5] The reasoning of the Supreme Court in *Lytle* is unassailable. It demonstrates, *inter alia,* that bifurcating pendent state claims or federal issues such as ADEA, Equal Pay Act, § 1981, and the like, from Title VII claims is futile, whether for the calculated purpose of avoiding a jury demand by a party who has invoked the Seventh Amendment, or in the mistaken belief that judicial economy will result. To the extent that *Sherman* may indicate a belief by the Eleventh Circuit that a trial court is not bound on a Title VII fact issue by a prior jury determination of that issue, even though the dispositive Title VII dispute has been properly presented to and decided by the jury, the Eleventh Circuit has been gainsaid by the Supreme Court in *Lytle,* where the Supreme Court, with utmost clarity, said:

> It would be anomalous to hold that a district court may not deprive a litigant of his right to a jury trial by resolving an equitable claim before a jury hears a legal claim raising common issues, but that a court may accomplish the same result by erroneously dismissing the legal claim. Such a holding would be particularly unfair here because Lytle *was required to join his legal and equitable claims to avoid the bar of res judiciata.*

____ S.Ct. at ____ (citation omitted) (emphasis supplied).

Can the trial court that receives the remand in *Lytle* say: "What the Supreme Court giveth in *Lytle* it hath already taken away in *Patterson,* which maketh this whole proceeding into an academic exercise?" If *Lytle* is to have any meaning, it stands for the proposition that a pre-*Patterson* case containing a § 1981

---

[5]This may explain why the Supreme Court denied certiorari in *Miller v. Fairchild Industries, Inc.,* 888 F.2d 498 (9th Cir. 1989), *cert. denied,* ____ U.S. ____, ____ S.Ct. ____ (1990), in which the Ninth Circuit held that the Seventh Amendment requires a trial court to follow a jury's implicit or explicit factual determinations in deciding legal claims when an employee invokes both Title VII and § 1981.

aspect, combined with a Title VII aspect, requires a jury trial. This proposition fits Walton's pre-*Patterson* case like a glove.

While no one can predict with one hundred per cent certainty what the Supreme Court eventually will say on the subject of jury trials in Title VII cases, when it finally decides to do so, it is helpful to consider some expressions by the Supreme Court in *Local 391,* delivered on the same day *Lytle* was decided. As discussed in *Beesley,* it is still unknown whether or not *post-Patterson* cases with a Title VII claim are insulated from the Seventh Amendment's guaranty of a jury trial. There is room for deduction from these statements in *Local 391:*

Judge Marshall said for the Court:

> An action for breach of a union's duty of fair representation was unknown in 18th-century England; in fact, collective-bargaining was unlawful. We must therefore look for an analogous cause of action that existed in the 18th century to determine whether the nature of this duty of fair representation suit is legal or equitable.
>
> * * *
>
> . . . [T]he trust analogy does not persuade us to characterize respondents' claim as wholly equitable. The Union's argument mischaracterizes the nature of our comparison of the action before us to 18th-century forms of action. As we observed in Ross v. Bernard, 396 U.S. 531 (1970), *'The Seventh Amendment question depends on the nature of the ISSUE to be tried rather than the character of the overall action.'*
>
> * * *
>
> In this case, *the only remedy sought is a request for compensatory damages representing backpay* and benefits. Generally, an action for money damages was 'the traditional form of relief offered in the courts of law.'
>
> * * *
>
> The *backpay* sought by respondents is not money wrongfully held by the Union, but wages and benefits they would have received from McLean had the

> Union processed the employees' grievances properly. Such relief is not restitutionary.

____ S.Ct. at ____ (emphasis supplied and citations omitted).

The last quoted paragraph from Justice Marshall is highly reminiscent of what Chief Judge Roney said about Mr. Bailey's claim in *Bailey v. USX*. Justice Brennan concurred in *Local 391*, saying:

> I would decide Seventh Amendment questions on the basis of the relief sought. If the relief is legal in nature, i.e., if it is the kind of relief that historically was available from courts of law, I would hold that the parties have a constitutional right to trial by jury — unless Congress has permissibly delegated the particular dispute to a non-Article III decisionmaker and jury trials would frustrate Congress' purposes in enacting a particular statutory scheme.

(footnote omitted).

* * *

> . . . [I]t is too late in the day for this Court to profess that the Seventh Amendment preserves the right to jury trial only in cases that would have been heard in the British law courts of the 18th century.

* * *

> What Blackstone described as 'the glory of the English law' and 'the most transcendent privilege which any subject can enjoy,' 3 W. Blackstone, Commentaries *379, was crucial in the eyes of those who founded this country. The encroachment on civil jury trial by colonial administrators was a "deeply divisive issue in the years just preceding the outbreak of hostilities between the colonies and England,' and all thirteen States reinstituted the right after hostilities ensued. "In fact, "[t]he right to trial by jury was probably the only one universally secured by the first American constitutions' ' . . . . In *Parsons v.*

> *Bedford*, 3 Pet. 433, 446 (1830), Justice Story stressed: "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy.' Similarly, in *Jacob v. New York City*, 315 U.S. 752, 752-753 (1942), we said that "[t]he right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence . . . [a] right so fundamental and sacred to the citizen [that it] should be jealously guarded by the court.'

____ S.Ct. at ____.

Justice Stevens also concurred, saying:

> . . . by definition, no recently recognized form of action — whether the product of express congressional enactment or of judicial interpretation — can have a precise analog in 17th or 18th century English law.
>
> * * *
>
> As the Court correctly observed in *Curtis v. Loether*, 415 U.S. 189, 195 (1974), "in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law.' As I had occasion to remark at an earlier proceeding in the same case, the relevant historical question is not whether a suit was 'specifically recognized at common law,' but whether 'the nature of the substantive rights asserted . . . is analogous to common law rights' and whether the relief sought is 'typical of an action at law.'

____ S.Ct. at ____ (citations omitted).

Dissenters, Justices Kennedy, O'Connor and Scalia, speaking through Justice Kennedy, dissented in *Local 391* only because they found the particular claims of breach of a duty of fair

representation to be of the nature of a fiduciary or a trusteeship claim and thus historically closely akin to equitable relief. Therefore, their dissent cannot accurately predict their view on jury trial under Title VII in an action seeking monetary damages. Specifically, they say:

> *If Congress has not provided for a jury trial, we are confined to the Seventh Amendment to determine whether one is required.* Our own views respecting the wisdom of using a jury should be put aside. Like Justice Brennan, I admire the jury process.

____ S.Ct. at ____ (emphasis supplied).

This does not sound as though Justices Kennedy, O'Connor and Scalia are going to dwell much on the ambiguous legislative history of Title VII when they face the issue. They are going straight to the constitutional and historical heart of the matter. When these dissenters refer to statutes which create federal causes of action but do not provide for a jury trial, they perfectly describe the Civil Rights Act of 1964. Will these three accept an argument which says that identical monetary relief, if obtained under § 1981, is "legal," but is "equitable" if obtained under Title VII? This court thinks not.

This court reads *Local 391* and *Lytle*, if not as a manifestation of agreement with the principle in *Bailey* that Title VII by necessary implication allows monetary relief outside the so-called "equitable" remedies enumerated in Title VII, certainly as a reinforcement of the Supreme Court's more recent and repeated recognitions of the reemergence of the Seventh Amendment as a force to be reckoned with. *See Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831 (1987) and *Granfinanciera S.A. v. Nordberg*, 492 U.S. ____, 109 S.Ct. 2782 (1989).

As in *Lytle*, plaintiff in the instant case had her § 1981 rug suddenly jerked from under her after she had legitimately demanded a jury trial on issues which, pre-*Patterson*, would clearly have been jury triable, and in which the jury verdict would undoubtedly have controlled the Title VII outcome. Overlaying this fact, and magnifying the jury issue, her cause

of action compares perfectly with an action brought by a female under the Equal Pay Act, the only difference being that Walton based her claim on race discrimination rather than on sex discrimination. Had she inserted the word "female" for the word "black," and had she invoked both the Equal Pay Act and Title VII, she would have been entitled, without question, to trial by jury. To deny her a jury trial because she is black instead of being simply female, presents a Fifth Amendment "equal protection" question of significant proportion. How could Congress, much less a federal court, justify rationally the granting of a jury trial on a female's claim or pay disparity while denying a jury trial for pay disparity identical in all respects except that it is based on the employee's race? The Fifth Amendment here works very well in harmony and in tandem with the Seventh.

Before leaving *Local 391*, this court would like to congratulate the Sixth Circuit for its opinion in *United Transp. Union, Local 74 v. Consolidated Rail Corp.*, 881 F.2d 282 (6th Cir. 1989), which reversed a district court's striking a jury demand in a case involving a claim of breach of the duty of fair representation. The Sixth Circuit, pre-*Local 391*, whether by wise parallel reasoning or by superior intuition, correctly anticipated the Supreme Court's holding in *Local 391*. This court has available to it more recent expressions on the subject of jury trial for statutory causes of action without any Congressional mandate than the Sixth Circuit had in *Local 74*, and more than the Eleventh Circuit had in *Sherman*. This court only hopes that with the tools it has it is as capable of predicting the Supreme Court as was the Sixth Circuit.

Although Walton does not attempt to distinguish her case from *Beesley* insofar as the jury trial issue is concerned, *Beesley* is distinguishable. In *Beesley* the plaintiff sought damages for alleged sexual harassment by her supervisor and invoked Title VII and § 1981 as her federal vehicles for obtaining damages from her employer. She did not claim a *constructive* discharge. She separately claimed for wrongful *actual* termination not necessarily connected to the harassment. The Seventh Circuit

holds that Title VII does not permit an award even of *nominal* damages for sexual harassment unless that harassment results in discharge. *Bohen v. City of East Chicago, Ind.*, 799 F.2d 1180 (7th Cir. 1986); *Swanson v. Elmhurst Chrysler Plymouth, Inc.*, 882 F.2d 1235 (7th Cir. 1989). In this holding the Seventh Circuit frankly acknowledges its disagreement with the First Circuit, the Fourth Circuit, the Fifth Circuit and the Eleventh Circuit. *T & S Associates v. Crenson*, 666 F.2d 722 (1st Cir. 1981); *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Joshi v. Florida State University*, 646 F.2d 981 (5th Cir. 1981); *Henson v. City of Dundee*, 683 F.2d 897 (11th Cir. 1982). In fact, in *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900 (11th Cir. 1988), the Eleventh Circuit further distanced itself from the Seventh Circuit by saying that a victim of sexual harassment "does not have to demonstrate a 'tangible loss' of an 'economic character' " in order to obtain at least nominal damages. The plaintiff in *Beesley* asked for more than nominal damages, perhaps because she disagreed with the Eleventh Circuit in *Dundee* and *Huddleston*, because of her reading of *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399 (1986), and certainly because she realized that "nominal damages" arguably might be deemed an "equitable remedy," whereas "compensatory damages," especially if it includes compensation for mental anguish, would surely constitute a "legal remedy" and therefore would carry the jury trial she demanded. In the instant case Walton definitely could not have been limited by Title VII, as a matter of law, to "nominal damages" against Cowin on the evidence she presented.

The Eleventh Circuit has handed down two recent decisions worthy of comment in this case. The first is *Abbott v. Williams*, 888 F.2d 1550 (11th Cir. 1989), written by Chief Judge Tjoflat. *Abbott* held that divorcing spouses in Alabama cannot be forced to litigate in an Alabama divorce court every legal dispute between them, because to establish such a requirement would contravene the Seventh Amendment's right to the jury trial of claims traditionally tried by jury. For years prior to *Abbott*, Alabama equity judges had assumed to the contrary,

blissfully unaware of the overriding significance of the Seventh Amendment. Although it did not do so, the Eleventh Circuit in *Abbott* might very well have cited *Granfinanciera* and the reawakened Supreme Court interest in the Seventh Amendment. Instead, it quoted approvingly a similar statement by the Supreme Court of Wisconsin:

> To enforce such an election would require an abused spouse to surrender both the constitutional right to a jury trial and valuable property rights to preserve his or her well-being. This the law will not do.

888 F.2d at 1554-1555, quoting *Stuart v. Stuart,* 143 Wis. 2d 347, 421 N.W. 2d 505, 508 (1988).

In *Abbott,* the trial court had assumed, as many courts apparently still assume, that if an important issue in a case is equitable, then the other issues are somehow subsumed or drawn into the "equity" maelstrom, and that the constitutional requirement for trying claims at law to a jury is somehow eliminated. *Abbott* makes just as clear as *Lytle* does that the Seventh Amendment stands in the way of this proposition. *Abbott* is the most recent acknowledgment by the Eleventh Circuit that the right to jury trial of traditional legal issues must be preserved at all cost. *Abbott* constitutes the Eleventh Circuit's very recent tacit agreement with *Tull, Granfinanciera, Lytle* and *Local 391.* It is difficult to reconcile *Abbott* with the *dicta* in *Sherman.*

The other recent Eleventh Circuit case deserving attention is *IMPACT v. Firestone,* 893 F.2d 1189 (11th Cir. 1990). In *IMPACT,* the panel was split, but it is unnecessary for this court to take sides, because the actual disposition is not as significant as the dissenter's general observation. This court finds that these words by Judge Edmondson in his dissent strike home:

> The teaching of *Burdine* and *Patterson,* and even more plainly of *Aikens,* is that employment discrimination trials are normal trials and that the lower federal courts have been wrong to view these trials as arcane proceedings governed by rigid

> mechanized formulae imposing special burdens and constraints on the parties. Reviewed as we normally review nonjury cases after a full trial, the trial judge's findings on racial discrimination here would be affirmed because they could not be described as clearly erroneous. Still we reverse. With today's decision, the court continues its resistance to the normalization of employment discrimination trials. I regret that the court is continuing in this direction. Further development of arcane rules of trial procedure does nothing to eradicate employment discrimination, but does make the trial court's job more difficult and does lead to more "errors" in trials with the result being greater expenditures of time, energy, and money on retrials.

893 F.2d at 1200-1201 (footnotes omitted).

This prophetic criticism could not as easily be made of trials in which juries decide the dispute between parties, whether or not pursuant to the arcane formulae which juries are regularly called upon to handle in ADEA, Equal Pay Act, § 1981 and § 1983 case. Either jurors are not so dumb that they cannot be trusted with complex matters, or the authors of the Seventh Amendment were naive.

From the *amici curiae* briefs filed in *Beesley* and from the arguments put forward by Cowin in this case, this court discerns a belief by at least a small segment of the litigating public that this court's behavior is aberrational in this instance and that never before during the entire history of Title VII has a Title VII case been tried to a jury. Although this court is not afraid of being alone, especially when it is predictably in the company of a future majority of the Supreme Court, this court is surely not alone at the district court level. Other district courts have tried Title VII cases to juries, especially where there were overlapping pendent state claims and/or federal claims which required trial by jury. Inadvertently predicting *Lytle*, here are a few examples of what other district courts earlier have said on the subject:

Hodgin v. Jefferson, 447 F. Supp. 804 (D. Md. 1978).

> Defendants argue that plaintiff should not be allowed to try her case before a jury since her § 1985 and Equal Pay Act claims should be dismissed, leaving only her Title VII claim, which is equitable in nature. In the alternative, they contend that the § 1985 and Equal Pay Act issues are ancillary to the Title VII claim, and thus should be tried before the Court.
>
> It is apparent that defendants' first argument is founded on the incorrect premise that the Court would dismiss all legal claims. Since the Court has retained a legal claim, the motion to strike plaintiff's jury election is inappropriate.
>
> It is true that the great weight of case law illustrates that trial by jury is not required by Title VII. *See, e.g., Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969); *Williams v. Travenol Laboratories, Inc.*, 344 F. Supp. 163 (N.D. Miss. 1972). While the argument in favor of denying a jury trial where the legal claims are "ancillary" to the Title VII count is somewhat persuasive, the cases have held otherwise. For example, in *Van Ermen v. Schmidt*, 374 F. Supp. 1070 (W.D. Wis. 1974), Judge James Doyle stated:
>
> > Where equitable and legal actions are joined in the same action and a jury trial is demanded, only the most extraordinary circumstances can justify a denial of a jury trial on the legal claims. *Characterization of the legal claim as incidental to the equitable claim cannot justify striking the jury demand. Id.* at 1073.

477 F. Supp. at 809-10 (emphasis in original).

Guyette v. Stauffer Chemical Co., 518 F. Supp. 521 (D. N.J. 1981)

> Defendants argue that the remedies available under state law, particularly compensatory and punitive damages and the right to a jury trial, would circumvent and subvert the equitable and remedial

purposes of Title VII. *See Gerlach v. Michigan Bell Telephone Co., supra* at 1173. Since the doctrine of pendent jurisdiction, however, unlike that of federal pre-emption, determines not the scope of the remedies available but only the forum in which the claims are tried, it would seem a matter of indifference to the federal court whether the state law remedies complement those available under federal law. If the federal court were to decline pendent jurisdiction, the state law claims would presumably be litigated in the state courts, and the effect of the state law remedies upon Title VII policies would be the same. As long as other considerations of fairness and convenience weigh in favor of pendent jurisdiction, therefore, there is no reason why a federal court should refuse pendent jurisdiction simply because state law provides remedies above and beyond those provided by Congress.

518 F. Supp. at 525.

Selbst v. Touche Ross & Co., 587 F. Supp. 1015 (S.D. N.Y. 1984)

Defendant's arguments for striking plaintiff's jury demand and her claim for damages are premised on dismissal of the state law claims. Assuming that only the federal claim were to remain, it argues that no right to trial by jury exists in cases arising under Title VII, and that punitive damages of the type alleged by plaintiff are not recoverable in a Title VII action. If we had dismissed plaintiff's state law claim, we would agree with defendant and grant the relief requested. However, having retained the state law claim, we find ourselves in the position of a state court judge in determining whether plaintiff is entitled to a jury trial and damages of the type requested. Neither party contests that under New York law plaintiff is so entitled. It may seem odd that Congress should preclude punitive damages and the right to a jury trial in Title VII claims, and then permit the

> recognition of such rights and claims in such actions through the device of pendent jurisdiction. That is, however, an oddity for Congress to correct. Under New York law plaintiff is entitled to a jury trial and may be entitled to punitive damages. We accordingly deny defendant's motion to strike these requests.

587 F. Supp. at 1017.

Although the trial court's opinion in *Sherman* is unpublished, it is clear from the reviewing opinion by the Eleventh Circuit that the trial court had presided over the trial of overlapping Title VII and § 1981 claims at the same time, expressly charging the jury on the Title VII issues. As demonstrated from the above three Federal Supplement quotations, the district court in *Sherman* was in pretty good company.

Since writing *Beesley I* and *Beesley II,* this court has received enough letters and telephone calls to have no doubt, if it ever had any, that this court is not alone in believing that Title VII cases, where monetary damages are being sought, are triable to a jury on proper demand. The court takes judicial knowledge of the fact that more and more jury demands are being filed in Title VII cases, and more and more motions to strike them are being denied. The ultimate concern on this issue will, of course, depend on the Supreme Court, which thus far has not spoken directly on the subject.

In one of three ways, this court could reduce, or could eliminate entirely, the possibility of having committed reversible error. First, the court could take Cowin's post-trial motion under advisement for a year, as some district courts do, in the hope that during the wait the question will be decided by the Supreme Court. Not only would this be contrary to this court's *modus operandi,* but it would add to the Congressional temptation to pass pending legislation designed to whip the overextended judiciary into line and to guarantee expeditious disposition of civil cases. *See* Senate Bill 2027. Second, the court could avoid the issue by an after-the-fact designation of this particular jury as "advisory" under Rule 39(c), F.R.Civ.P., and

itself make findings of fact and state conclusions of law, with or without accepting the jury's "advice." Third, this court could take the position which the district court took in *Ochoa v. American Oil Company*, 338 F. Supp. 914 (S.D. Tex. 1972). That court fully and eloquently aired its belief that the Seventh Amendment mandates a jury trial in Title VII cases. It made a better argument than this court could ever make, and then, in frustration, concluded:

> The foregoing constitutes the opinion of the Court. Unfortunately, it cannot form the ratio decidendi of the ruling. The precise question raised by the motion at bar was presented and decided in *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969), where the Court of Appeals for this Circuit held that the right to trial by jury does not exist in a Title VII suit. Although this conclusion was stated in a single paragraph and in a manner so summary as to suggest that the Court had not been fully apprised of the serious constitutional implications of its decision, it is nonetheless the law of the Circuit and, as such, binds this Court. Accordingly, the cause shall be struck from the jury docket.

338 F. Supp. at 914 (footnote omitted).

This court recommends a thorough reading of *Ochoa*. After such a reading no serious legal scholar would question the integrity or the jurisprudence of the district judge who wrote *Ochoa*. However, in 1972 the judge in *Ochoa* did not have the ADEA, or *Tull*, or *Granfinanciera*, or *Patterson*, or *Local 319*, or *Lytle*, to look at. The judge in *Ochoa* did have and did cite James, *Right to a Jury Trial in Civil Actions*, 72 Yale L.J. 655 (1963), an article written by this court's law professor, a fact which is not as significant as the fact that this court thoroughly agrees with what Professor James said and the fact that Professor James' article is relied upon by Justice Brennan in his *Local 391* concurrence.

It is for these reasons that this court will neither retreat nor shirk on the Title VII jury trial issue, and will adhere to what it said in *Beesley*.

The court will deny Cowin's post-trial motion, finding that Cowin's arguments claiming alleged errors other than the error of granting the jury trial have been adequately dealt with in the previous opinion which granted in part and denied in part Cowin's motion for directed verdict. An appropriate, separate order will be entered.

DONE this 3rd day of April, 1990.

/s/ William M. Acker, Jr.

WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAM
SOUTHERN DIVISION

REGINA THOMAS WALTON,	)	
	)	
Plaintiff	)	
	)	CIVIL ACTION NO.
VS.	)	89-AR-0263-S
	)	
COWIN EQUIPMENT COMPANY, INC.,	)	
	)	
Defendant	)	
	)	

ORDER

In accordance with the accompanying memorandum opinion, the motion for directed verdict filed by defendant, Cowin Equipment Company, Inc., at the conclusion of all of the evidence, insofar as it is addressed to plaintiff's claim of retaliation is GRANTED. Therefore, that aspect of Regina Thomas Walton's action which seeks relief for an alleged violation of Title VII based on retaliation by Cowin Equipment Company, Inc., in response to plaintiff's having filed a claim with the Equal Employment Opportunity Commission is hereby DISMISSED with prejudice. This renders MOOT both defendant's first motion for directed verdict on this issue and the jury's answer to interrogatory No. 4.

Also, in accordance with the accompanying memorandum opinion, defendant's two motions for directed verdict as to the other aspect of plaintiff's action alleging a racially motivated differential in pay for substantially similar work are OVERRULED, and judgment in hereby ENTERED in favor of plain-

tiff, Regina Thomas Walton, and against defendant, Cowin Equipment Company, Inc., in the sum of $14,622.40 upon the jury's verdict, namely, its answers to interrogatories No. 1, 2 and 3.

All other relief sought by plaintiff, except for attorney's fees and expenses, pursuant to 42 U.S.C. § 1988, is DENIED.

Costs are taxed against defendant.

DONE this 14th day of March, 1990.

/s/ William M. Acker, Jr.

WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7264

D. C. Docket No. CV-89-AR-0263-S

REGINA THOMAS WALTON,

Plaintiff-Appellant,
Cross-Appellee,

versus

COWIN EQUIPMENT COMPANY, INC.,

Defendant-Appellee,
Cross-Appellant.

Appeals from the United States District Court
for the Northern District of Alabama

March 11, 1991

Before TJOFLAT, Chief Judge, DUBINA, Circuit Judge, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

This is a Title VII employment discrimination action. In her complaint, as amended, appellant seeks declaratory and injunctive relief, and various monetary awards. The district court, concluding that Title VII claimants are entitled to a trial by jury, tried this case to a jury. The jury found for appellant in the sum of $14,622.40; the court thereafter gave appellant judgment for that amount and denied her request for equi-

table relief. We vacate the court's final judgment and remand this case for further proceedings.

Title VII actions, such as this one, are proceedings in equity, *see Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515 (11th Cir. 1991); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir. 1990); accordingly, Title VII litigants are not entitled to a trial by jury. (A jury, if used, may serve only as an advisory jury.) The district court therefore erred in trying this case to a jury and binding itself to the jury's verdict.

On remand, the district court shall treat this case as a proceeding in equity, consider whether to grant the relief appellant seeks, and enter findings of fact and conclusions of law as required by Fed.R.Civ.P. 52(a).

VACATED and REMANDED, with directions.

United States Court of Appeals
for the Eleventh Circuit

No. 90-7264

D.C. Docket No. CV-89-AR-0263-S

REGINA THOMAS WALTON,

Plaintiff-Appellant,
Cross-Appellee,

versus

COWIN EQUIPMENT COMPANY, INC.,

Defendant-Appellee,
Cross-Appellant.

Appeals from the United States District Court
for the Northern District of Alabama

Before TJOFLAT, Chief Judge, DUBINA, Circuit Judge, and HENDERSON, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby VACATED; and that this cause be and the same is hereby REMANDED to the said District Court with instructions in accordance with the opinion of this Court.

IT IS FURTHER ORDERED THAT each party bear their own costs on appeal.

Entered: March 11, 1991
For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: Apr 02 1991

February 15, 1990 11:37 a.m.

(Jury present.)

VERDICT

THE COURT: Y'all go ahead and have a seat. Once you have been seated, we'll sit.

Ms. Plan has told me that you have reached a verdict. Would you hand it to her, please, ma'am.

THE FOREMAN: (Complying.)

THE COURT: (Reading.)

All right. If you would, publish the verdict.

THE CLERK: In the case of Regina Thomas Walton v. Cowin Equipment Company, 89-AR-263-S, answers to the jury interrogatories are as follows:

No. 1: Did on or about September 11, 1987, defendant Cowin Equipment Company ever intentionally act to the detriment of plaintiff Regina Thomas Walton in an employment matter in a way which was substantially motivated by Ms. Walton's race?

Answer: Yes.

No. 2: Only if the jury has answered question No. 1 yes, state whether or not defendant Cowin Equipment Company would have reached the same decision or decisions as to Ms. Walton, notwithstanding the fact the jury has found that the defendant considered plaintiff's race in an employment matter or matters.

Answer: No.

No. 3: Only if the jury has answered question No. 1 yes and question No. 2 no, state the amount of monetary loss, if any, which plaintiff has proven that she sustained as a proximate consequence of the defendant's discriminatory treatment of plaintiff.

Answer: $14,622.40.

No. 4: After plaintiff filed her charge of discrimination with the Equal Employment Opportunity Commission on March 9, 1988, against defendant, did defendant take any adverse em-

ployment action of any kind against plaintiff as a result of her filing her said charge?

Answer: Yes.

Signed by the foreman, Christy L. Harwell; dated February 15, 1990.

THE COURT: All right. Does the jury have any further obligations to the Court?

THE CLERK: No, sir. They are released.

(Transcript, Vol. IV, pp. 586-587.)